ARE MORE JUDGES ALWAYS THE ANSWER?

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

FIRST SESSION

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ARE MORE JUDGES ALWAYS THE ANSWER?

TUESDAY, OCTOBER 29, 2013

HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to call, at 2:48 p.m., in room 2141, Rayburn Office Building, the Honorable Bob Goodlatte, (Chairman of the Committee) presiding.

Present: Representatives Goodlatte, Coble, Smith of Texas, Bachus, King, Franks, Poe, Marino, Gowdy, Amodei, Holding, Collins, DeSantis, Conyers, Scott, Johnson, and Garcia.

Staff present: (Majority), Shelley Husband, Chief of Staff & General Counsel; Allison Halataei, Parliamentarian & General Counsel; David Whitney, Counsel; Branden Ritchie, Deputy Chief of Staff & Chief Counsel; Kelsey Deterding, Clerk; (Minority) Perry Apelbaum, Minority Staff Director & Chief Counsel; Danielle Brown, Parliamentarian; Susan Jensen, Counsel.

Mr. GOODLATTE. The Judiciary Committee will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

The Ranking Member has stepped out, as has the gentleman from Virginia, for two different missions. I expect them both to return, and we are grateful to have the gentleman from Florida with us, but we think we will go ahead and proceed with the hearing, and I will recognize myself for an opening statement, and then Mr. Conyers when he returns.

On June 4, the President nominated three individuals to a single circuit court. These nominations, together with the recent confirmation of another, are intended to pack the D.C. Circuit to its absolute capacity of 11 authorized judgeships.

Given that, first, each judgeship costs taxpayers more than a million dollars a year; second, that there are eight vacancies designated as emergencies on our nation's circuit courts and the President has not submitted a nomination for the majority of these positions; the D.C. Circuit's workload has steadily dropped over the years; and the court has six active senior judges who contribute substantially to its work; it is appropriate to ask whether filling these judgeships is the highest and best use of limited taxpayer dollars and to consider alternative explanations as to why the President has decided to pursue such an aggressive and virtually unprecedented strategy with respect to these vacancies.

In announcing his nominations, the President asserted, "If we want to ensure a fair and functioning judiciary, our courts cannot be short-staffed." So is this court in need of a dramatic expansion?

In absolute numbers, it has the lowest number of total appeals, with 1,193. That is down more than 13 percent from 2005. Measured by the number of oral arguments heard per active judge, it dropped from 99 cases in 2003-2004 to 81 recently.

In terms of signed written decisions per active judge, the court averages 17, less than one-third the national average of 58.

The court clearly has the lowest caseload in the country, and we aren't even considering the work of the six senior judges on the D.C. Circuit who are estimated to do the work of three-and-a-quarter full-time active judges.

If the court isn't short-staffed, why are the President and his allies so determined to fill it up?

But before examining that, let's review the Keisler standard for the D.C. Circuit vacancies articulated by eight Democratic senators in a July 27, 2006 letter. At the outset they stated, "Mr. Keisler should, under no circumstances, be considered, much less confirmed, by the Committee before we first address the very need for that judgeship and deal with the genuine judicial emergencies identified by the Judicial Conference."

They asserted, "by every relevant benchmark, the caseload for that circuit has only dropped" and insisted "before we rush to consider Mr. Keisler's nomination, we should look closely at whether there is even a need for this seat to be filled and at what expense to the taxpayer."

What criteria did those Democratic senators endorse to measure the judicial workload? One, written decisions per active judge; two, number of appeals resolved on the merits per active judge; and three, total number of appeals filed.

Since 2005, these numbers are significantly down in two out of three categories for the D.C. Circuit.

In closing, they emphasized the letter reflected the unanimous request of Democratic senators. So the Keisler standard is the standard of "all Democratic senators." That standard, when applied honestly and consistently, leads to one conclusion: the D.C Circuit doesn't need additional judges.

So our colleagues in the other body took a firm position. Or did they? Consider one Senate Democrat's recent comments about the D.C. Circuit, who told an audience in March, "Our strategy will be to nominate four more people for each of those vacancies." And, "we will fill up the D.C. Circuit one way or another." That doesn't sound like he is concerned about the court's caseload.

A few months later, some groups united behind this effort, complaining that a majority of the court's senior judges, who still can and do decide cases, were appointed by Republican presidents. That doesn't sound like they are concerned about the court's ability to function, either.

But sadly, this isn't the first time the President and his allies have packed a circuit court with unneeded judges at a time when its workload is declining. The Fourth Circuit has actually canceled argument dates for two successive months because the court "did

not have cases needing argument on Friday in October or December."

As recently as December 2007, there were only 10 active judges on that court. Today, there are 15. Of that number, six were nominated by the President and confirmed by the same Democratic senators who wrote so earnestly about their regard for taxpayers shortly before.

The Fourth Circuit's total appeals filed are down 7 percent since 2006. Twelve judges handled the higher caseload back then. Since that time, there has been a 25 percent increase in judges. Looking at the caseload, that doesn't explain this.

Maybe the President and Senate Democrats see judicial authorizations as a floor, not a ceiling. Maybe also their view is that the courts exist not merely to resolve cases and controversies but to advance their political agenda. When the Senate Majority Leader said, "We're focusing very intently on the D.C. Circuit" and "We need at least one more. There's three vacancies. And that will switch the majority," he clearly wasn't referring to the court's needs.

The campaign to politicize our courts and to specifically target the second-highest court in the land risks not merely wasting scarce public funds but something more valuable, public confidence in the judiciary's independence.

The evidence is clear: this campaign has nothing to do with fair and functioning courts. It has everything to do with ideology and power politics.

And the Ranking Member now being present, I will ask the gentleman from Florida if he would like to be recognized.

Mr. GARCIA. Thank you, Mr. Chairman, just for a moment.

I would like to ask for unanimous consent to submit a few things into the record.

The first is a Constitutional Accountability Center letter to Chairman Coons, Senate Judiciary Subcommittee, regarding caseloads and the need for judges worldwide.

The second is the People for the American Way's "The D.C. Circuit's Caseload: Countering the GOP's Hypocrisy and Distortion" claims it is too light to justify having more than 8 of its 11 seats filled.

Number three, the statement from retired Chief Judge Patricia Wald before the Senate Bankruptcy Committee.

And the fourth is a statement from Timothy Tymkovich, chair of the Committee on Judicial Conference before the Senate Bankruptcy Committee of September 10, 2013.

Mr. GOODLATTE. The Chair thanks the gentleman.

Without objection, those documents will be made a part of the record.

[The information referred to follows:]

1200 18th STREET NW, SUITE 501 • WASHINGTON DC 20036
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September 9, 2013

Hon. Christopher Coons
Chairman, Senate Judiciary Committee
Subcommittee on Bankruptcy and the Courts
127A Russell Senate Office Building
Washington, DC 20510

Dear Chairman Coons:

To assist the Subcommittee in its consideration of the issues to be presented at its September 10, 2013 hearing on the "Federal Judgeship Act of 2013," a hearing that will consider "the caseload and need for judges nationwide, including the [United States Court of Appeals for the] D.C. Circuit,"[1] we are writing on behalf of Constitutional Accountability Center mainly to address a bill recently introduced by Judiciary Committee Ranking Member Charles Grassley to eliminate immediately three of the 11 authorized judgeships from the D.C. Circuit. Unlike the Federal Judgeship Act, Senator Grassley's proposal is not based on recommendations by the Judicial Conference or on any other study. Rather, it appears to be intended primarily to prevent the President from filling vacancies on this critical court. It should be rejected for this reason.

On April 10, 2013, at the start of the Judiciary Committee's confirmation hearing for then-D.C. Circuit nominee Sri Srinivasan, Senator Grassley announced that he was introducing a "Court Efficiency Act," S. 699, which would, if enacted, eliminate three of the 11 authorized judgeships from the D.C. Circuit, and add one judgeship each to the Second Circuit and the 11th Circuit.[2] Senator Grassley justified S. 699 by highlighting the "imbalance" in the workloads of the three Circuits, and stated that the bill would take effect upon enactment.[3] All of the other Republican members of the Judiciary Committee are original co-sponsors of the bill.

While it is perfectly legitimate for members of the Senate to question whether a specific federal court has too many judges, or too few, based on workload, S. 699 goes far beyond asking such questions – it answers them. And it does so without the benefit of any of the indicia of neutrality and objectivity that should accompany a proposal to dramatically reduce the size of a federal court. Perhaps the most telling indication that this proposal is not objective or neutral is that in one fell swoop it would eliminate nearly 30% of the seats on the D.C. Circuit, yet it is not based on any study of the court's workload or judicial staffing concluding that such an extraordinary reduction in the number of judges on this important court is warranted. In fact, the proposal ignores recent recommendations of the Judicial

[1] Remarks of Hon. Patrick Leahy, Chairman, Senate Judiciary Committee, Executive Business Meeting (Aug. 1, 2013).
[2] *See* Senator Charles Grassley News Release, "Nomination of Sri Srinivasan and Court Efficiency Act" (April 10, 2013), available at <http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=45436>.
[3] *Id.*

Conference. By letter of April 5, 2013 to Senate Judiciary Chairman Patrick Leahy, a copy of which was also sent to Senator Grassley, the Judicial Conference transmitted to the 113th Congress "the Conference's Article III and bankruptcy judgeship recommendations and corresponding draft legislation for the 113th Congress" (the basis of the proposed Federal Judgeship Act of 2013). With respect to the Circuit Courts, these recommendations included the addition of four judges to the Ninth Circuit and one to the Sixth Circuit; there was no recommendation to add any judges to the Second or 11th Circuits, or to eliminate any seats on the D.C Circuit or not fill any existing vacancies on that court. S. 699 would not only dramatically reduce the size of the D.C. Circuit bench, but it would also add judgeships to courts where the Judicial Conference has not stated they are needed.

Senator Grassley's proposal is based on a comparison of the numbers of cases in the D.C. Circuit with the numbers of cases in other Circuits, equating one D.C. Circuit case with one case in the other courts in terms of workload burden. While this might be an appropriate methodology when comparing the workloads of other appellate courts, it is not appropriate for the D.C. Circuit, which, according to the Federal Judicial Center, has a unique caseload heavily weighted with administrative agency appeals "that occur almost exclusively in the D.C. Circuit and [are] more burdensome than other cases in several aspects,"[4] including having "more independently represented participants per case" and "more briefs filed per case," as well as the fact that they are "more likely to have participants with multiple objectives, involve complex or statutory law, and require the mastery of technical or scientific information."[5]

The unique nature of the D.C. Circuit's workload has been noted repeatedly by those who have served as judges on that court, including no less an authority than the Chief Justice of the United States, John Roberts, who has said:

> It is when you look at the docket that you really see the differences between the D.C. Circuit and the other courts. One-third of the D.C. Circuit appeals are from agency decisions. That figure is less than twenty percent nationwide. About one-quarter of the D.C. Circuit's cases are other civil cases involving the federal government; nationwide that figure is only five percent. All told, about two-thirds of the cases before the D.C. Circuit involve the federal government in some civil capacity, while that figure is less than twenty-five percent nationwide.[6]

As former D.C. Circuit Chief Judge Pat Wald -- who served on that court for more than twenty years -- has explained:

> The D.C. Circuit hears the most complex, time-consuming, labyrinthine disputes over regulations with the greatest impact on ordinary Americans' lives: clean air and water regulations, nuclear plant safety, health-care reform issues, insider trading and more. These cases can require thousands of hours of preparation by the judges, often consuming days of argument, involving

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[4] U.S. General Accounting Office, *Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships*, GAO-03-788R, at 10 (May 30, 2003) (quoting Federal Judicial Center, *Assessment of Caseload Burden in the U.S. Court of Appeals for the D.C. Circuit*, Report to the Subcommittee on Judicial Statistics of the Committee on Judicial Resources of the Judicial Conference of the United States (Washington, D.C. 1999)).

[5] *Id.*

[6] John G. Roberts, Jr., "What Makes the D.C. Circuit Different? A Historical View," 92 Va. L. Rev. 375, 376-77 (2006).

> hundreds of parties and interveners, and necessitating dozens of briefs and thousands of pages of record – all of which culminates in lengthy, technically intricate legal opinions.[7]

Judge Wald further noted that "My colleagues and I worked as steadily and intensively as judges on other circuits even if they may have heard more cases. The nature of the D.C. Circuit's caseload is what sets it apart from other courts."[8]

Indeed, precisely because of the unique and complex nature of the D.C. Circuit's caseload, the Judicial Conference does not apply to the D.C. Circuit the caseload formula that it uses to evaluate how many judges are appropriate for the other Circuit Courts.[9] In this respect, the Conference recognizes what Senator Grassley's proposal does not -- that the D.C. Circuit's cases cannot be equated numerically, one for one, with the cases of the other federal appellate courts. Senator Grassley's proposal is based on the flawed comparison of apples and oranges.

In addition, the assertion that the current caseload of the D.C. Circuit requires the elimination of nearly 30% of its authorized judgeships is contradicted by the fact that other recent nominees were confirmed to this same court when the caseload numbers were less. For example, President George W. Bush's nominees Janice Rogers Brown and Thomas Griffith were confirmed to the 10th and 11th seats on the D.C. Circuit in June 2005, even though the caseload per authorized judge (109) was smaller than it is now (132).[10] That number was also smaller when John Roberts was confirmed to the D.C. Circuit in May 2003 -- 83 cases pending per authorized judge -- as well as when Brett Kavanaugh was confirmed in May 2006 -- 125 cases pending per authorized judge.[11]

And in February 2003, when there were eight active judges on the D.C. Circuit (the same number as now), Senator Orrin Hatch stated the following in urging the confirmation of Bush nominee Miguel Estrada to the court's ninth seat:

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[7] Patricia M. Wald, "Senate must act on appeals court vacancies," *Washington Post* (Feb. 28, 2013), available at: < http://articles.washingtonpost.com/2013-02-28/opinions/37350554_1_senior-judges-chief-judge-appeals-court-vacancies>.

[8] *Id.* For more information, *see also* Judge Wald's remarks about the D.C. Circuit at the March 25, 2013 discussion of "Why Courts Matter: The D.C. Circuit," here: http://www.americanprogress.org/events/2013/03/14/56746/why-courts-matter-the-d-c-circuit/.

[9] *See* U.S. General Accounting Office, *Federal Judgeships: The General Accuracy of the Case-Related Workload Measures Used to Assess the Need for Additional District Court and Courts of Appeals Judgeships*, GAO-03-788R, at 8, 11 (May 30, 2003).

[10] On March 31, 2005 -- the date closest to the confirmations of Brown and Griffith for which these figures have been published by the U.S. Courts -- there were 1,313 cases pending in the D.C. Circuit, which at the time had 12 authorized judgeships, or 109 cases per authorized judge. The most current published U.S. Courts statistics are as of March 31, 2013, when there were 1,456 pending cases in the D.C. Circuit, or 132 cases per authorized judge. Another way to look at the data is by cases per active judge, measuring the workload of the judges actually on the court. In March 2005, there were nine active judges on the D.C. Circuit, and thus 146 cases per active judge. After Brown's confirmation to the 10th seat, there were 131 cases per active judge, a number that dropped to 119 when Griffith was confirmed. Currently, with only eight active judges on the D. C. Circuit, the caseload is 182 appeals per active judge, 53% higher than it was when Griffith was confirmed. (With all three current vacancies filled, the caseload per active judge would be 132.)

[11] These figures are calculated using the number of cases pending on March 31, 2003 and March 31, 2006, respectively, the closest dates to the confirmations of Roberts and Cavanaugh for which these statistics are published.

> It is a very important court. In fact, next to the Supreme Court, it is the next most important court in the country – no question about it – because the decisions they make affect almost every American in many instances. . . *I might also add that the D.C. Circuit is in the midst of a vacancy crisis unseen in recent memory. Only eight of the court's 12 authorized judgeships currently are filled. . . The D.C. Circuit has not been down to eight active judges since 1980. It is a crisis situation becouse it is extremely important. The vocancy crisis is substantially interfering with the D.C. Circuit's ability to decide cases in a timely fashion.* As a result, litigants find themselves waiting longer and longer for the court to resolve their disputes. Because so many D.C. Circuit cases involve constitutional and administrative law, this means that the validity of challenged government policies is likely to remain in legal limbo.[12]

As of March 31, 2003, the nearest date to Senator Hatch's speech for which there are published data from the U.S. Courts regarding the D.C. Circuit's workload, the court had 1,001 cases pending, or a workload of only 83 cases per authorized judge. Now, as noted above, that workload is 132 cases per authorized judge. Moreover, what Senator Hatch said about the D.C. Circuit in 2003 remains true today: the court is of vital importance to America and it is currently understaffed, not overstaffed.

Some conservatives who support Senator Grassley's proposal or who have advocated that the Senate not permit the vacancies on the D.C. Circuit to be filled have claimed that President Obama, by complying with his constitutional mandate to nominate people to fill authorized seats on the federal bench, is engaging in "court packing."[13] This of course is an utter misuse of the term, which has its origins in the proposal by President Franklin Delano Roosevelt to add *new* judicial seats to the Supreme Court in an effort to shift the Court's balance – not to a President's simply doing his constitutionally specified job, that is, nominating people to fill existing, authorized judicial *vocancies*.

It should come as no surprise, then, that even some conservatives have had a hard time understanding the "court packing" charge. As Byron York, a Fox News contributor and author of *The Vast Left Wing Conspiracy*, noted, "it doesn't strike me as 'packing' to nominate candidates for available seats."[14] American Enterprise Institute scholar Norm Ornstein said that the claim made him "laugh out loud."[15] Ornstein continued by asking, "How could a move by a president simply to fill long-standing existing vacancies on federal courts be termed court packing?"[16] That's a good question. If anything, it appears that Senator Grassley and other supporters of S. 699 are attempting to maintain the D.C. Circuit's marked ideological imbalance; with six senior judges continuing to hear cases alongside the eight active judges, the court is starkly divided (or packed, one might say), 9-5, in favor of judges appointed by Republican Presidents.

The D.C. Circuit is rightly considered to be the Nation's second most important court, after the Supreme Court. This is because the D.C. Circuit has exclusive or favored jurisdiction over disputes

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[12] 149 Cong. Rec. No. 21, S1953 (daily ed. Feb. 5, 2003) (statement of Senator Hatch, emphasis added), available at: <http://www.gpo.gov/fdsys/pkg/CREC-2003-02-05/pdf/CREC-2003-02-05-pt1-PgS1928-3.pdf#page=25>.

[13] *See, e.g.*, Jennifer Bendery, "Republicans Charge Obama With Court-Packing for Trying to Fill Empty Seats," *Huffington Post* (May 28, 2013), available at: < http://www.huffingtonpost.com/2013/05/28/obama-court-packing_n_3347961.html>.

[14] Byron York, Twitter (May 28, 2013), available at: <https://twitter.com/ByronYork/statuses/339389884672389121>.

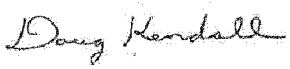
[15] Norm Ornstein, "It Might Finally Be Time for the 'Nuclear Option' in the Senate," *The Atlantic* (May 30, 2013), available at: < http://www.theatlantic.com/politics/archive/2013/05/it-might-finally-be-time-for-the-nuclear-option-in-the-senate/276377/>.

[16] *Id.*

involving numerous federal laws and regulations, and is responsible for resolving critically important cases involving national security, environmental protection, employment discrimination, food and drug safety, separation of powers, and the decisions of a wide array of administrative agencies. The full staffing of this court is of nationwide importance. Certainly no decision to effectuate a nearly 30% reduction in the number of judges on this critical court, or to decline to fill authorized vacancies, should be made in a partisan, political manner and without careful study.

Sincerely,

Judith E. Schaeffer
Vice President



Doug Kendall
President
Constitutional Accountability Center

PEOPLE FOR THE AMERICAN WAY

THE DC CIRCUIT'S CASELOAD: COUNTERING THE GOP'S HYPOCRISY AND DISTORTIONS

Hypocrisy: Caseload Changes Over Time

Republicans claim the DC Circuit's caseload is too light to justify having more than 8 of its 11 seats filled. But it actually had a smaller caseload when Republicans worked to fill the 9th, 10th, and 11th seats with George W. Bush's nominees.

Now (Obama):	1,479 pending cases	GOP says 8 judges are enough
June 2005 (Bush):	1,313 pending cases	Brown & Griffith confirmed to 10th & 11th seats
May 2003 (Bush):	1,001 pending cases	Roberts confirmed to 9th seat
July 2003 (Bush):	941 pending cases	Cloture effort for Estrada for 10th seat
		Brown & Kavanaugh nom'd for 10th & 11th seats

Sen. Grassley and his fellow Republicans prefer to define the caseload by case filings over a year, but even under that system, Republicans pushed to fill the 9th, 10th, and 11th seats at a time when the DC Circuit's caseload was lighter than it is today:

Now (Obama):	1,137 filings	GOP says 8 judges are enough
May 2003 (Bush):	1,077 filings	Roberts confirmed to 9th seat
July 2003 (Bush):	1,063 filings	Cloture effort for Estrada for 10th seat
		Brown & Kavanaugh nom'd for 10th & 11th seats

Sen. Grassley tried a similar trick the last time a Democrat was in the White House. He held a subcommittee hearing in October of 1995 and pushed the idea that the DC Circuit should only have 9 seats. Yet *even under Grassley's own definition*, it had a much higher caseload than at any point during the Bush years.

1995 (Clinton):	1,625 filings	Grassley suggested 9 judges were enough
June 2005 (Bush):	1,359 filings	Brown & Griffith confirmed to 10th & 11th seats

Distortions: Invalid Comparisons to the Other Circuits

Sen. Grassley and his GOP colleagues have called the DC Circuit "the least-busy, least-worked appellate court in the nation." To support this accusation, they directly compare the DC Circuit's raw caseload numbers with those of other circuits. But there is no shortage of experts who have pointed out that, because of the DC Circuit's unique caseload of complex administrative cases, comparisons to other circuits are invalid.

The point was made most recently in September by the chair of the Judicial Conference's Standing Committee on Judicial Resources, which analyzes courts' caseloads and makes recommendations

concerning how many judgeships are needed to get the work done. Tenth Circuit Judge Timothy Tymkovich – a conservative who was nominated to the bench by George W. Bush – discussed this at a Senate committee hearing last month. He specifically explained why the D.C. Circuit's caseload is different from other circuits, so much so that the raw-number caseload statistics used for other circuits are not relevant to ascertaining the D.C. Circuit's caseload:

> The D.C. [Circuit] Court of Appeals has been excluded from the pure numerical standard. We employ a different process with that court, because of the uniqueness of their caseload. They have a heavy administrative practice. They have something like 120 administrative appeals per judgeship panel, versus about 28 for the other Courts of Appeals. So historically, those types of cases have driven a more complex and difficult evaluation. Those cases have multiple parties, typically issues of first impression, big records, things that make them somewhat outliers [compared] to some of the cases we see in the other circuits. Some of those cases are exclusive jurisdiction in the D.C. court. So for that reason, we've excluded them from the same processes as the other circuits.

Chief Justice Roberts, who once served on the DC Circuit, even wrote a law journal article discussing the uniqueness of that court's caseload and citing its comparatively heavy caseload of appeals from administrative agencies.

So simplistic comparisons of case filings to other circuits are meaningless.

Based on Grassley's expert analysis and in-depth understanding of caseload statistics, his bill would also add seats to the 2nd and 11th Circuits. However, the Judicial Conference has requested new judgeships for other circuits, not those. In fact, just a few weeks ago, Sen. Jeff Sessions – one of Grassley's Republican colleagues on the Senate Judiciary Committee and a co-sponsor of his bill – even specifically cited the 2nd Circuit as one that did not seem to need new judgeships, based on the data presented by the Judicial Conference, and he approvingly noted that the 11th Circuit has not requested and does not need any new judgeships.

More Hypocrisy on the Other Circuits

Republicans have this year unanimously confirmed nominees to other circuits whose caseloads before confirmation were lower than the DC Circuit's.

8th Cir.	153 pending cases per active judge	GOP voted to confirm Jane Kelly in April
10th Cir.	150 pending cases per active judge	GOP voted to confirm Greg Phillips in July
DC Cir.	185 pending cases per active judge	GOP says 8 judges can handle this caseload

Conclusion

The GOP's focus on the DC Circuit caseload isn't about efficiency – it's about blocking a Democratic president from being able to fill seats on the nation's second highest court.

The DC Circuit has 11 judgeships by law. Republicans cannot change that law by legitimate means set forth in the Constitution. So they are using obstruction to change a law that they can't change through democratic means.

STATEMENT OF PATRICIA M. WALD,
RETIRED CHIEF JUDGE OF THE D.C. CIRCUIT COURT OF APPEALS,
ON COMPLEXITY OF D.C. CIRCUIT CASES
Before the SUBCOMMITTEE ON BANKRUPTCY AND THE COURTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
HEARING ON THE FEDERAL JUDGESHIP ACT OF 2013

September 10, 2013

I have been asked to comment on the complexity of the cases on the D.C. Circuit Court of Appeals' docket as compared to the other 11 circuit courts of appeal. The comparative complexity of its cases is of course only one factor to be considered in deciding the appropriate number of judgeships to enable the Circuit Court to do its work efficiently, but it is a singularly important one. There is virtually unanimous agreement that the kind and mix of cases that come before the D.C. Circuit are exceptionally demanding from a technical standpoint, and uniquely burdensome in terms of sheer time compared to other circuits. Chief Justice John Roberts noted in his 2006 Virginia Law Review article, "What Makes the D.C. Circuit Different?", written while he served on the Circuit, that the D.C. Circuit's caseload is composed of one third appeals from federal agencies (the national figure for all circuits is 20%); combined with another one fourth consisting of other federal civil cases makes up a total of two thirds of the D.C. Circuit's docket involving the federal government rather than disputes between individual parties (the comparable national figure is 25% for all circuits). In the now-Chief Justice's own words "whatever combination of letters you can put together, it is likely that jurisdiction to review that agency's decision is vested in the D.C. Circuit", adding "lawyers frequently prefer to litigate in the D.C. Circuit because there is a far more extensive body of administrative law developed there than in other courts".

Washington Post columnist Glenn Kessler more recently dipped down another layer into these and later statistics gleaned from the Administrative Office of the U.S. Courts that show in 2012 , 45% of D.C. Circuit appeals were administrative appeals which he described as "highly complex and tak[ing] more time to review". This figure he compared to the less than 3% administrative appeals (omitting immigration cases of which the D.C. Circuit rarely has any) that is the national average of other circuits. The most recent figures from the Administrative Office for the year ending June 30, 2013 show that the D.C. figure remains about the same today.

(Table B-3). Minimally then, it seems clear that the D.C. Circuit's docket cannot be rationally compared to other circuits on the basis of raw case numbers alone, regardless of how those calculations are made.

The greater complexity of administrative appeals manifests itself in judge's workloads in several ways, some statistically demonstrable, some not. The D.C. Circuit according to the latest figures has the highest percentage (49.2%) of decisions on the merits rendered after oral argument, in marked contrast to 10 circuits where oral argument is denied in 70-90% of merits cases (63% in the Seventh Circuit). Further, 42% of D.C. Circuit termination decisions on the merits result in written, published opinions, again the highest among the 11 circuits and the D.C. Circuit's 57% unpublished opinion rate ranks lowest among the circuits, the national figure being 88%. (Tables S-1 and S-3). These statistics indicate that a higher percentage of D.C. Circuit cases than those of other courts of appeal merit oral argument and require the research and drafting that attend a formal opinion with precedential value. The larger percentages of appeals accorded summary treatment in other circuits indicates a lesser degree of judicial input for their largest category of cases which are typically disposed of by short memoranda, often relying on a single precedent and/or a few sentences of discussion. It is relatively rare that an administrative agency appeal of the kind heard in the D.C. Circuit, certainly not a rulemaking, could be treated in that fashion, in large part due to the several levels of internal review within the government before an agency can go to court. Also to be noted is that a single massive consolidated appeal in an agency case combining the separate appeals of many organizations and parties will be counted statistically as one appeal even though reading, reviewing and considering the separate arguments of many appellants may take widely disproportionate amounts of time. About 22% of D.C. Circuit appeals in 2013 terminated on the merits were consolidated cases, a vastly greater number than in other circuits.

But it is undoubtedly the nature of the agency appeal cases, especially the rulemakings, that set the D.C. Circuit apart. Agency appeal cases deeply impact every aspect of Americans' lives, the air they breathe, the water they drink, the safety of their workplace, the health care they receive, the security of their investments, the competitive pricing of the goods they buy. These complex regulations which undergird every major government regulatory program-regulations which often consume hundreds of triple-columned, single-spaced Federal Register pages –if challenged and the major ones usually are-almost inevitably pass through the D.C. Circuit's

portal. And because these rules come directly to the appeals court, its judges must do their legal evaluations from scratch without the benefit of lower court's findings available in non-agency appeals. This kind of review takes time. Their complexity is of two dimensions— understanding the underlying factual situations giving rise to the disputes which can be scientific, technological, industrial and often obtuse to non-experts and assessing the legal questions arising from the precepts of administrative law which themselves are often versed in general terms like "preponderance of the evidence", "substantial evidence", "due deference", "in the public interest" and must be applied to those factual situations. It is also of moment that the D.C. Circuit is the court of last resort in such cases except for those few that the Supreme Court elects to hear. In the past the High Court has steered clear of the vast bulk of the monstrous regulatory reviews. But when it does take agency cases, not surprisingly it takes more of them from the D.C. Circuit than from any other. It thus behooves the Circuit judges to do their important work painstakingly and fastidiously since in the final analysis they are responsible for the major part of the development of the body of administrative law that guides the regulatory governance of the nation. Thus it is the D.C. Circuit that will hear the inevitable challenges to the Affordable Care Act's implementing regulations and to the Dodd-Frank Financial Services regulations. Indeed Chief Justice Roberts in his 2006 article acknowledged "the D.C. Circuit's unique character, as a court with special responsibility to review legal challenges to the conduct of the national government...." It goes without saying that to perform that special responsibility the court needs sufficient time and resources; according to Professor John Golden who studied the Circuit's history, "When the D.C. Circuit addresses questions such as the constitutionality of legislative vetoes of agency rulemaking or agency rules of national scope, such as setting national ambient quality standards the significance for policymakers and members of the general public is plain".

The D.C. Circuit has a separate complex litigation track for hearing a handful of the most time-consuming and complex of these regulatory cases; five such are scheduled for the coming year. Neither the Chief Judge nor senior judges customarily sit on these cases (only one senior judge currently has). One example of such a case is *Sierra Club v. Costle*, 657 F2d. 298 (1981) in which I wrote the opinion. It dealt with "the extent to which new coal-fired steam generators that produce electricity must control their emissions of sulfur dioxide and particulate matter into the air". The Petitioners in the appeal (consolidated from 7 separate cases) all filed separate briefs totaling 760 pages setting forth varied arguments and interests. They included the Appalachian

Power Company, the Sierra Club, the Environmental Defense Fund, California Air Resources Board; the Intervenors included the National Coal Association and the Missouri Association of Municipal Utilities; the Respondent was the Environmental Protection Agency assisted by the Department of Justice. Oral argument consumed days and involved many advocates. The environmental groups thought the EPA regulations too lax, the utilities thought them too rigorous. The effects of coal-burning power plants on public health and their importance to our economy were pitted against each other. The Joint Appendix totaled 5600 pages. EPA's explanation of the Rule in the Federal Register took up 43 triple columns of single spaced type. The rule had been several years in the making inside EPA and later undergoing White House review. Our review at the Circuit level encompassed numerous novel procedural issues with serious implications for agency informal rulemaking as well as substantive challenges, culminating in a 227 page slip opinion (with a 26 page appendix of charts) issued within 7 months of argument. While it was being deliberated and drafted, life went on in the Circuit and our panel judges had to maintain their normal schedule of other cases.

Cases accorded special complex schedule treatment as well as other agency cases on the regular calendar, likewise entailing issues of enormous national import and likewise extremely time consuming are, if anything, more typical of the D.C. Circuit's docket now than during my tenure. A prime example is the area of climate control. The D.C. Circuit has exclusive jurisdiction to hear challenges to national regulations promulgated under several major environmental statutes, including notably the Clean Air Act. A 2008 study prepared by then-chair of the House Energy & Commerce Committee, Henry Waxman, reported that between 2002 and 2008, the D.C. Circuit decided 94 cases involving challenges to EPA decisions implementing the Clean Air Act alone. During subsequent years, the Circuit has reviewed a continuing stream of highly significant and complex Clean Air Act regulatory decisions by the current administration including an August 20, 2013 ruling on sewage sludge incinerator standards, a July 12, 2013 ruling on ethanol and other non-fossil-fuel carbon dioxide sources, a January 4, 2013 ruling on two EPA regulations concerning airborne particulate matter, and a June 2012 decision (now on review before the Supreme Court) striking down EPA's "good neighbor rule" regulating individual states' contributions to air pollution levels in neighboring downwind states.

The environmental area's intimate relationship to the Circuit is paralleled by other agencies such as communications (FCC) and energy (FERC). Mid-2013 figures show that 68% of the Court's consolidated cases terminated on the merits involved agency rulemakings. (Tables B-3 and S-1).

Finally, in the interests of brevity, I will only mention the extraordinary prominence of the Circuit in constitutional as well as regulatory jurisprudence, setting the stage for the Supreme Court on such issues as executive privilege, attorney client privilege for government lawyers, the survival of that privilege after death, the application of the recess clause to executive appointments, First Amendment rights to demonstrate in front of embassies, the application of constitutional guarantees to "enemy combatants" (all appeals from habeas corpus petitions by Guantanamo detainees and from military commission convictions are heard exclusively by the D.C. Circuit). None of these cases are "average" or "typical" for federal courts.

In sum it seems highly relevant to consider seriously the kinds of cases the D.C. Circuit hears with atypical frequency when deciding on its special judicial needs.

STATEMENT OF HONORABLE TIMOTHY M. TYMKOVICH
CHAIR, COMMITTEE ON JUDICIAL RESOURCES OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
BEFORE THE SUBCOMMITTEE ON
BANKRUPTCY AND THE COURTS
OF THE
COMMITTEE ON THE JUDICIARY OF THE
UNITED STATES SENATE

September 10, 2013

Chairman Coons, Ranking Member Sessions and members of the subcommittee, I am Timothy Tymkovich, Circuit Judge for the Tenth Circuit Court of Appeals and Chair of the Judicial Conference Committee on Judicial Resources, and I appreciate your invitation to appear today to discuss the Article III judgeship needs of the Federal Judiciary.

The Judicial Resources Committee of the Judicial Conference of the United States is responsible for all issues involving human resource administration, including the need for Article III judges and support staff in the U.S. courts of appeals and district courts. My testimony today has two purposes: to provide information about (1) the judgeship needs of the district and appellate courts, and (2) the process by which the Judicial Conference determines those needs.

It has been over two decades since Congress passed a comprehensive judgeship bill. In that 1990 legislation, Congress created 85 additional judgeships reflecting an 11% increase in total authorized Article III judgeships. As I will discuss later, Congress has

also provided some relief in district courts with exceptional needs, primarily along the border, in the late 1990s and early 2000s.

But caseloads have continued to rise. To enable the Judiciary to continue serving litigants efficiently and effectively, the judicial workforce must be expanded. I would therefore like to thank Senator Coons and Senator Leahy for introducing S. 1385, the Federal Judgeship Act of 2013, which reflects all of the Judicial Conference's Article III judgeship recommendations transmitted to Congress earlier this year. While the Judicial Conference feels strongly that each of these judgeship recommendations is justified due to the growing workload in these courts, it is cognizant of the current economic realities and the prospective cost associated with the proposal. It therefore acknowledges that it may not be possible for all of these judgeships to be authorized in a single legislative vehicle and that prioritization within the recommendations may be necessary.

Every other year, the Conference conducts a survey of the judgeship needs of the U.S. courts of appeals and U.S. district courts. The latest survey was completed in March 2013. Consistent with the findings of that survey and the deliberations of my Committee, the Conference recommended that Congress establish 91 new judgeships in the courts of appeals and district courts. The Conference also recommended that eight existing temporary district court judgeships be converted to permanent status. Appendix 1 contains the specific recommendation as to each court. All of the judgeships recommended by the Conference would be authorized by S. 1385. For many of the

courts, the recommendations reflect needs that have existed since the last omnibus judgeship bill was enacted in 1990.

Survey Process

In developing these recommendations, the Judicial Conference (through its committee structure) uses a formal process to review and evaluate Article III judgeship needs. The Committee on Judicial Resources and its Subcommittee on Judicial Statistics conduct these reviews, but the Conference makes the final recommendations on judgeship needs. Before a judgeship recommendation is transmitted to Congress, it undergoes careful consideration and review at six levels within the Judiciary, beginning with the judges of the particular court making a request. If the court does not make a request, the Conference does not consider recommending a judgeship for that court. Next, the Subcommittee on Judicial Statistics conducts a preliminary review of the request and either affirms the court's request or offers its own reduced recommendation, based on the court's workload and other stated contributing factors. Once this review is complete, the Subcommittee's recommendation and the court's initial request are forwarded to the judicial council of the circuit in which the court is located.

Upon completion of the council's review, the Subcommittee on Judicial Statistics conducts a further and final review of the request and/or recommendation, reconciling any differences that may still exist. The Subcommittee then submits the recommendation to the full Committee on Judicial Resources. Finally, the Judicial Conference considers

the full Committee's final product. In the course of the 2013 survey, the courts requested 94 additional judgeships, permanent and temporary. Our review procedure reduced the number of recommended additional judgeships to 91.

During each judgeship survey, requests from courts recommended for additional judgeships in the previous survey (two years prior) are re-considered, taking into account such factors as the most current caseload data, relevant trends and changes in the availability of judicial resources. In some instances, this review prompts adjustments to previous recommendations.

Judicial Conference Standards

The recommendations developed through the review process described above (and in more detail in Appendix 2) are based in large part on a numerical caseload standard. These standards are not by themselves fully indicative of each court's needs. They represent the caseload at which the Conference begins to consider requests for additional judgeships – the starting point in the process, not the end point.

Caseload statistics must be considered and weighed with other court-specific information to arrive at a sound measurement of each court's judgeship needs. Circumstances that are unique, transitory, or ambiguous are carefully considered so as not to result in an overstatement or understatement of actual burdens. The Conference process therefore takes into account additional factors, including:

- the number of senior judges available to a specific court, their ages, and levels of activity;
- available magistrate judge assistance;
- geographical factors, such as the size of the district or circuit and the number of places of holding court;
- unusual caseload complexity;
- temporary or prolonged caseload increases or decreases;
- the use of visiting judges; and
- any other factors noted by individual courts (or identified by the Statistics Subcommittee) as having an impact on the need for additional judicial resources. (For example, the presence of high profile financial fraud and bribery prosecutions, the number of multiple defendant cases, and the need to use court interpreters in a high percentage of criminal proceedings).

Courts requesting additional judgeships are specifically asked about their efforts to make use of all available resources including their use of senior and magistrate judges, intercircuit and intracircuit assignment of judges to provide short-term relief, and alternative dispute resolution.

District Court Analysis

Reviewing the judgeship needs of the district courts, the Conference, after accounting for the additional judgeship(s) requested by the court, initially applies a

standard of 430 weighted filings per judgeship to gauge the impact on the district. Weighted filings statistics account for the different amounts of time district judges require to resolve various types of criminal and civil cases. Applying this standard to the current recommendations, the workload exceeds 500 weighted filings per judgeship in 28 of the 32 district courts in which the Conference is recommending either an additional judgeship or conversion of an existing temporary judgeship to permanent status; 17 courts exceeded 600 weighted filings per judgeship.

Appellate Court Analysis

In the courts of appeals, the Conference, again after accounting for the additional judgeship(s) requested by the circuit court, uses a standard of 500 adjusted filings per panel as its starting point. Adjusted filings are calculated by removing reopened appeals and counting original pro se appeals as one-third of a case. In each appellate court in which the Conference is recommending additional judgeships, the caseload levels substantially exceed the standard, averaging over 700 adjusted filings per panel. Other factors bearing on workload have been closely considered as well. For example, the circuits' individual rules regarding how cases are designated for oral argument affect the percentage of cases that receive oral argument in each circuit, which also impacts the workload.

In short, caseload statistics furnish the threshold for consideration, but the process entails a critical scrutiny of the caseloads in light of many other considerations and variables, all of which are considered together.

Caseload Information

National data provide general information about the changing volume of the courts' business. Since the last comprehensive judgeship bill for Article III courts was enacted in 1990, case filings have risen significantly. From fiscal year 1991 to fiscal year 2012 filings in the district courts have risen 39 percent, with civil filings increasing by 32 percent and criminal felony defendants by 67 percent. Between 1999 and 2002, Congress created 34 additional judgeships in the district courts in response to particular problems in certain districts. Even with these additional resources, however, the number of weighted filings per judgeship nationwide in district courts has reached 520--clearly well above the Judicial Conference standard for considering additional judgeships.

Over the same time, court of appeals filings have grown by 34 percent, but, unlike the district courts, no judgeships have been added to the courts of appeals since 1990. As a result, the national average caseload per three-judge panel has reached 1,033. Were it not for the assistance provided by senior and visiting judges, the appellate courts would not have been able to keep pace.

The judgeship needs of a particular court, however, require a more focused analysis of court-specific data. Indeed, in districts where the Conference has recommended additional judgeship resources, the need is much more dramatic compared to the national figures. As stated previously, there are 28 district courts with caseloads exceeding 500 per judgeship, and more than half of these courts have caseloads in excess

of 600 per judgeship. Overall, the average weighted filings for courts needing additional judgeships is 628, far exceeding the Conference standard of 430 for additional judgeships. Appendix 3 provides a more detailed description of the most significant changes in the caseload since 1990.

The lack of additional judgeships combined with the growth in caseload has created enormous difficulties for many courts across the nation, but it has reached urgent levels in five district courts that are struggling with extraordinarily high workloads, with 700 or more weighted filings per authorized judgeship, averaged over a three-year period. The severity of conditions in the Eastern District of California, the Eastern District of Texas, the Western District of Texas, the District of Arizona, and the District of Delaware requires immediate action. The Conference urges Congress to establish new judgeships in those districts as soon as possible.

The Conference is also extremely concerned about the eight existing temporary judgeships which have been recommended for conversion to permanent status. All eight of these judgeships will lapse before the end of fiscal year 2014, and without re-authorization, these on-board resources will be lost, further damaging the Federal Judiciary by diminishing already scarce judicial resources in these districts.

The Conference appreciates the efforts that the Senate, and in particular this Committee, has made to authorize some of these critically needed judgeships. Specifically, the Conference supports all of the judgeships included in S. 744, the Border Enforcement, Economic Opportunity, and Immigration Reform Act, passed by the Senate earlier this year. That bill would authorize eight new district court judgeships and convert two temporary district court judgeships to permanent status in Southwest border districts

where the caseload, already at extraordinarily high levels, would be further impacted by the bill's immigration enforcement measures.

Conclusion

Over the last 20 years, the Judicial Conference has developed, adjusted, and refined the process for evaluating and recommending judgeship needs in response to both judiciary and congressional concerns. The Conference does not recommend, or wish, indefinite growth in the number of judges. It recognizes that growth in the Judiciary must be carefully limited to the number of new judgeships that are necessary to exercise federal court jurisdiction.[1] The Conference attempts to balance the need to control growth and the need to seek resources that are appropriate to the Judiciary's caseload. In an effort to implement that policy, we have requested far fewer judgeships than the caseload increases and other factors would suggest are now required. Furthermore, the Conference, mindful of the dire fiscal realities that our federal government is currently facing, acknowledges the possibility that not all of the requested judgeships may be created and that some prioritization may have to occur.

Again, the Judicial Conference of the United States is grateful for the introduction of S. 1385, the Federal Judgeship Act of 2013, which reflects the Article III judgeship recommendations of the Judicial Conference of the United States. Thank you for the opportunity to appear today and for your continued support of the Federal Judiciary. I would be happy to answer any questions the Subcommittee may have.

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[1]JCUS-SEP 93, p.51; JCUS-SEP 95, p.44.

Appendix 1

TABLE 1. ADDITIONAL JUDGESHIPS OR CONVERSION OF EXISTING JUDGESHIPS RECOMMENDED BY THE JUDICIAL CONFERENCE
2013

CIRCUIT/DISTRICT	AUTHORIZED JUDGESHIPS	JUDICIAL CONFERENCE RECOMMENDATION	ADJUSTED FILINGS PER PANEL/WEIGHTED FILINGS PER AUTHORIZED JUDGESHIP
U.S. COURTS OF APPEALS		**5P, 1T**	ADJUSTED FILINGS
NINTH	29	4P, 1T	843
SIXTH	16	1P	593
U.S. DISTRICT COURTS		**65P, 20T, 8T/P**	WEIGHTED FILINGS
DELAWARE	4	1P	1,165
CALIFORNIA, EASTERN	6	6P, 1T	1,132
TEXAS, EASTERN	8	2P, T/P	1,042
TEXAS, WESTERN	13	4P, 1T	752
ARIZONA	13	6P, 4T, T/P	712
CALIFORNIA, CENTRAL	28	10P, 2T, T/P	691
CALIFORNIA, NORTHERN	14	5P, 1T	675
COLORADO	7	2P	663
WASHINGTON, WESTERN	7	2P	660
INDIANA, SOUTHERN	5	1P	642
FLORIDA, SOUTHERN	18	3P, T/P	639
FLORIDA, MIDDLE	15	5P, 1T	634
NEW YORK, WESTERN	4	1P	626
FLORIDA, NORTHERN	4	1P	619
WISCONSIN, WESTERN	2	1P	613
ALABAMA, NORTHERN	8	T/P	613
CALIFORNIA, SOUTHERN	13	3P, 1T	602
NEW YORK, EASTERN	15	2P	596
NEW JERSEY	17	2P, 1T	587
IDAHO	2	1P	577
TEXAS, SOUTHERN	19	2P	568
MINNESOTA	7	1P, 1T	556
MISSOURI, WESTERN	6	1T	553
GEORGIA, NORTHERN	11	1P, 1T	552
NEVADA	7	1P, 1T	547
OREGON	6	1T	533
NEW MEXICO	7	1P, T/P	527
NEW YORK, SOUTHERN	28	1P, 1T	525
TENNESSEE, MIDDLE	4	1T	497
VIRGINIA, EASTERN	11	1T	472
KANSAS*	6	T/P	471
MISSOURI, EASTERN	8	T/P	424

P = PERMANENT; T = TEMPORARY; T/P = TEMPORARY MADE PERMANENT

* If the temporary judgeship lapses, the recommendation is amended to one additional permanent judgeship.

Appendix 2

JUDGESHIP RECOMMENDATIONS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

JUDICIAL CONFERENCE PROCESS

In developing judgeship recommendations for consideration by Congress, the Judicial Conference, through its committee structure, uses a formal survey process to review and evaluate Article III judgeship needs, regularly and systematically. The nationwide surveys of judgeship needs are based on established criteria related to the workload of the judicial officers. These reviews are conducted biennially by the Committee on Judicial Resources (Committee), with final recommendations on judgeship needs approved by the Judicial Conference.

The recommendations are based on justifications submitted by each court, the recommendations of the judicial councils of the circuits, and an evaluation of the requests by the Committee using the most recent caseload data. During each judgeship survey, the Judicial Conference reconsiders prior, but still pending, recommendations based on more recent caseload data and makes adjustments for any court where the workload no longer supports the need for additional judgeships. The Judicial Conference has also implemented a process for evaluating situations where it may be appropriate to recommend that certain positions in district courts be eliminated or left vacant when the workload does not support a continuing need for the judicial officer resource.

In general, the survey process is very similar for both the courts of appeals and the district courts. First, the courts submit a detailed justification to the Committee's Subcommittee on Judicial Statistics (Subcommittee). The Subcommittee reviews and evaluates the request and prepares a preliminary recommendation which is given to the courts and the appropriate circuit judicial councils for their recommendations. More recent caseload data are used to evaluate responses from the judicial council and the court, if a response is submitted, as well as to prepare recommendations for approval by the Committee. The Committee's recommendations are then provided to the Judicial Conference for final approval.

COURT OF APPEALS REVIEWS

At its September 1996 meeting, on the recommendation of the Judicial Resources Committee, which consulted with the chief circuit judges, the Judicial Conference unanimously approved a new judgeship survey process for the courts of appeals. Because of the unique nature of each of the courts of appeals, the Judicial Conference process involves consideration of local circumstances that may have an impact on judgeship needs. In developing recommendations for courts of appeals, the Committee on Judicial Resources takes the following general approach:

A. Courts are asked to submit requests for additional judgeships provided that at least a majority of the active members of the court have approved submission of the request; no recommendations for additional judgeships are made without a request from a majority of the members of the court.

B. Each court requesting additional judgeships is asked to provide a complete justification for the request, including the potential impact on its own court and the district courts within the circuit of not getting the additional judgeships. In any instance in which a court's request cannot be supported through the standards noted below, the court is requested to provide supporting justification as to why the standard should not apply to its request.

C. The Committee considers various factors in evaluating judgeship requests, including a statistical guide based on a standard of 500 filings (with removal of reinstated cases) per panel and with pro se appeals weighted as one third of a case. This caseload level is used only as a guideline and not used to determine the number of additional judgeships to recommend. The Committee does not attempt to bring each court in line with this standard.

The process allows for discretion to consider any special circumstances applicable to specific courts and recognizes that court culture and court opinion are important ingredients in any process of evaluation. The opinion of a court as to the appropriate number of judgeships, especially the maximum number, plays a vital role in the evaluation process, and there is recognition of the need for flexibility to organize work in a manner which best suits the culture of the court and satisfies the needs of the region served.

DISTRICT COURT REVIEWS

In an ongoing effort to control growth, in 1993, the Judicial Conference adopted new, more conservative criteria to evaluate requests for additional district judgeships, including an increase in the benchmark caseload standard from 400 to 430 weighted cases per judgeship. Although numerous factors are considered in looking at requests for additional judgeships, the primary factor for evaluating the need for additional district judgeships is the level of weighted filings. Specifically, the Committee uses a case weighting system[1] designed to measure judicial caseload, along with a variety of other factors, to assess judgeship needs. The Judicial Conference and its Committee review all available information on the workload of the courts and supporting material provided by the individual courts and judicial councils of the circuits. The Committee takes the following approach in developing recommendations for additional district judgeships:

A. In 2004, the Subcommittee amended the starting point for considering requests from current weighted filings above 430 per judgeship to weighted filings in excess of 430 per judgeship *with the additional judgeships requested*. For courts with fewer than five authorized judgeships, the addition of a judgeship would often reduce the caseload per judgeship substantially below the 430 level. Thus, for small courts the 430 per judgeship standard was replaced with a standard of current weighted filings above 500 per judgeship. These caseload levels are used only as a guideline and a factor to determine the number of additional judgeships to recommend. The Committee **does not** attempt to bring each court in line with this standard.

B. The caseload of the individual courts is reviewed to determine if there are any factors present that create a temporary situation that would not provide justification for additional judgeships. Other factors are also considered that would make a court's situation unique and provide support either for or against a recommendation for additional judgeships.

C. The Committee reviews the requesting court's use of resources and other strategies for handling judicial workload, including a careful review of each court's use of senior judges, magistrate judges, and alternative dispute resolution, in addition to a review of each court's use of and willingness to use visiting judges. These factors and geographic considerations are used in conjunction with the caseload information to decide if additional judgeships are appropriate, and to arrive at the number of additional judgeships to recommend for each court.

D. The Committee recommends temporary judgeships in all situations where the caseload level justifying additional judgeships occurred only in the most recent years, or when the addition of a judgeship would place a court's caseload close to the guideline of 430

[1] "Weighted filings" is a mathematical adjustment of filings, based on the nature of cases and the expected amount of judge time required for disposition. For example, in the weighted filings system for district courts, each civil antitrust case is counted as 3.45 cases while each homicide defendant is counted as 1.99 weighted cases. The weighting factors were updated by the Federal Judicial Center in June 2004 based on criminal defendants and civil cases closed in calendar year 2002.

weighted filings per judgeship. The Committee also recommends at least a portion of additional judgeships as temporary when recommending a large number of additional judgeships for a particular court. In some instances the Committee also considers the pending caseload per judgeship as an additional factor supporting an additional temporary judgeship.

Appendix 3

CASELOAD CHANGES SINCE LAST JUDGESHIP BILL

A total of 34 additional district court judgeships have been created since 1991, but six temporary judgeships have lapsed. These changes have resulted in a four percent increase in the overall number of authorized district court judgeships; court of appeals judgeships have not increased. Since the last comprehensive judgeship bill was enacted for the U.S. courts of appeals and district courts, the numbers of cases filed in those courts have grown by 34 percent and 39 percent, respectively. Specific categories of cases have seen dramatic changes over the past two decades. Following is a summary of the most significant changes.

U.S. COURTS OF APPEALS *(Change in authorized judgeships: 0)*

- The total number of appeals filed has grown by 34 percent, nearly 15,000 cases, since 1991.
- Appeals of criminal cases have increased 33 percent since 1991.
- The most dramatic growth in criminal appeals has been in immigration appeals, which increased from 145 in 1991 to 1,616 in 2012.
- Appeals of decisions in civil cases from the district courts have risen eight percent since 1991.
- The most dramatic growth in civil appeals has been in prisoner appeals where case filings are up 37 percent since 1991.
- Appeals involving administrative agency decisions have fluctuated over the years, but have nearly tripled, growing from 2,859 in 1991 to 8,391 in 2012. The increases resulted primarily from appeals of decisions by the Board of Immigration Appeals, with the largest increases occurring in the Second and Ninth Circuits.
- Original proceedings have grown from 609 in 1991 to 4,265 in 2012, partially as a result of the Antiterrorism and Effective Death Penalty Act which requires prisoners to seek permission from courts of appeals for certain petitions. Although enacted in April 1996, data for these and certain pro se mandamus proceedings were not reported until October 1998.

U.S. DISTRICT COURTS *(Change in authorized judgeships: +4%)*

- Total filings have grown by over 100,000 cases, a 39 percent increase since 1991.
- The civil caseload has fluctuated over the last 21 years, but has increased 32 percent overall since 1991.

- The most dramatic growth in civil filings occurred in cases related to personal injury product liability which have grown from 10,952 filings in 1991 to 43,083 in 2012, due to a large number of asbestos filings and an increase in multi-district litigation cases.
- Civil rights filings increased steadily after the Civil Rights Act of 1990 was enacted. Although cases have declined from their peak in 1997, the number of civil rights filings was 90 percent above the 1991 level.
- Protected property rights cases more than doubled between 1991 and 2012. Trademark, patent, and copyright filings all showed growth since 1991, although the largest increase occurred in patent filings, which more than quadrupled.
- The number of social security cases filed in 2012 rose to more than twice the number filed in 1991.
- Prisoner petitions increased 26 percent between 1991 and 2012, due to significantly higher numbers of motions to vacate sentence filings and habeas corpus petitions.
- Fair Debt Collection Practices Act cases were first categorized separately in 2008. These filings increased from 4,239 in 2008 to 9,320 cases in 2012.
- Foreclosure filings nearly quadrupled between 2008 and 2012, reversing a steady decline between 1991 and 2008.

- The number of criminal felony defendants has increased 67 percent since 1991.
  - The largest increase, by far, has been in immigration offenses which rose from 2,448 in 1991 to 25,184 in 2012.
  - Defendants charged with firearms offenses more than doubled between 1991 and 2012, an increase of over 4,500 cases.
  - The number of drug-related defendants in 2012 was 26 percent above the number filed in 1991.
  - The number of fraud defendants fluctuated between 1991and 2012, but remained 24 percent above the number filed in 1991.
  - Defendants charged with drug, immigration, firearms, and fraud offenses comprised 85 percent of all felony defendants in 2012.
  - Sex offense defendants nearly doubled between 2005 and 2012.

Mr. GOODLATTE. We are expecting Senator Grassley, one of our four witnesses, to arrive, but his schedule is complicated, as are the House Members'. Therefore, we will proceed with the witnesses who are already present, and we will welcome Senator Grassley when he arrives.

If the witnesses would all rise, we will, as is the custom of this Committee, begin by swearing in the witnesses.

[Witnesses sworn.]

Mr. GOODLATTE. Thank you very much. Let the record reflect that the witnesses responded in the affirmative.

I will now proceed by introducing first Ambassador C. Boyden Gray, former White House Counsel to President George H.W. Bush and current founding partner of the D.C.-based law firm Boyden Gray & Associates, LLP.

Ambassador Gray was appointed Special Envoy for European Affairs by Secretary of State Condoleezza Rice in January of 2008. He was appointed as the United States Ambassador to the European Union by President George W. Bush in January of 2006.

Ambassador Gray currently serves as a member of the Board of Directors at the Atlantic Counsel, the European Institute, and FreedomWorks.

He received his J.D. from the University of North Carolina School of Law and his Bachelor's degree from Harvard University.

We are now joined by Senator Grassley, so I will go back to the beginning and introduce him, and then come back and introduce Ms. Aron and Ms. Severino, and then we will come back to the senator for his testimony.

So our first witness today is the Honorable Charles E. Grassley, senior United States Senator representing the State of Iowa for over 30 years. Senator Grassley currently serves as Ranking Member of the Senate Judiciary Committee, and also serves on the Finance, Agriculture, and Budget Committees.

Prior to being elected to the Senate, Senator Grassley served in the U.S. House of Representatives from 1975 to 1981, and the Iowa House of Representatives from 1969 to 1975.

Senator Grassley earned his B.A. and M.A. from the University of Northern Iowa, and pursued a Ph.D. at the University of Iowa.

Our third witness is Ms. Nan Aron, Founder and President of Alliance for Justice, a national association of public interest and civil rights organizations. In her role, Ms. Aron has a particular focus on the judiciary. In 1985, she founded the Judicial Selection Project through Alliance for Justice. Prior to AFJ, Ms. Aron served as an attorney for the ACLU's National Prison Project. She also taught at Georgetown and George Washington University Law Schools.

Ms. Aron received her J.D. from Case Western Reserve University School of Law and her B.A. from Oberlin College.

And our fourth and final witness is Ms. Carrie Severino, Chief Counsel and Policy Director of the Judicial Crisis Network. In her position, Ms. Severino speaks and writes regularly on judicial issues, the Federal nomination process, and state judicial selection. She has also testified before Congress and briefed elected officials on these judicial and constitutional issues. In addition, Ms. Severino has experience as a law clerk to Justice Clarence Thomas

of the United States Supreme Court and to Judge David Sentelle of the United States Court of Appeals for the D.C. Circuit.

She received her J.D. cum laude from Harvard Law School and a B.S. in biology summa cum laude from Duke University.

Welcome to all of you.

Senator Grassley, it is particularly great to have you on this side of the Capitol, and you are welcome to give your testimony.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within the time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

Senator Grassley?

Senator, if you don't mind, in keeping with the custom of this Committee, we have sworn in the other three witnesses before you arrived, and I neglected to do that. So if you are willing to be sworn in, as we always do with all of our witnesses in our hearings, do you swear that the testimony you are about to give shall be the truth, the whole truth, and nothing but the truth, so help you God?

[Witness sworn.]

Mr. GOODLATTE. Thank you. Let the record indicate the witness answered in the affirmative, and now he is welcome to give his testimony.

TESTIMONY OF THE HONORABLE CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA, AND RANKING MEMBER, SENATE COMMITTEE ON THE JUDICIARY

Senator GRASSLEY. Mr. Chairman, Ranking Member Conyers, and Members of the Committee, thank you for this opportunity.

Mr. GOODLATTE. Senator, I think you may need to press that button.

Senator GRASSLEY. I have tremendous respect for the Federal judiciary. We need to preserve, protect and strengthen it. As legislators, we also have an obligation to be good stewards of the taxpayer's money.

The Federal Government shouldn't expect a good result from simply throwing additional money at an issue, especially during these trying fiscal times.

Fortunately, one of the best ways to strengthen the judiciary also happens to be the most cost-effective. I have been committed to reallocating judicial resources in more efficient ways for many years of the 33 years I have served on the Judiciary Committee.

During the 1990's when I was Chairman of the Subcommittee on Administrative Oversight and the Courts, I led a multi-year effort to study the allocation of court resources, including an examination of court caseloads and the allocation of judgeships.

There has been some controversy over the years regarding the D.C. Circuit, and some of that controversy has centered on the D.C. Circuit's caseload.

My work on the court study ultimately led to a successful effort during the Bush Administration to remove a seat from the D.C. Circuit and reallocate to the 9th Circuit.

There are two important points about that effort. First, Republicans—that is my party—worked to remove a seat from the D.C. Circuit while a Republican occupied the White House. Second, although the D.C. Circuit seat was removed immediately, the new seat in California did not take effect until January of 2009.

In other words, we took away from President Bush the opportunity to make that nomination. But we did not give him the opportunity to make an additional nomination to the Ninth Circuit. Instead, we delayed that authority until a new President could make that nomination.

For additional context, I would like to remind people in 2006, the other side—meaning the Democrats—argued that we should not fill any more than 10 seats on the D.C. Circuit based upon that caseload, and we have letters that will show that. So, they successfully blocked Mr. Keisler on that basis.

Since that time in 2006, the caseload statistics have declined even further. They have fallen so much during the last few years that the caseload per active judge today, with 8 active judges, is nearly the same as it was back then, with 10 active judges.

In fact, Chief Judge Garland, a Clinton appointee to the D.C. Circuit, recently confirmed that the caseload has continued to fall. According to Chief Judge Garland, the number of cases scheduled for oral argument per active judge has fallen steadily over the last 10 years. In 2006, there were 90 cases scheduled for oral argument per active judge. By the 2012 to 2013 term, the number had declined to 81.

Moreover, other judges on the court confirm that the caseload simply doesn't merit additional judges. As one judge wrote to me, "I do not believe the current caseload of the D.C. Circuit or, for that matter, the anticipated caseload in the near future, merits additional judgeships at this time. If any more judges were added now, there wouldn't be enough work to go around."

That is a current judge on the court saying, and so I say again, if any more judges were added now, there wouldn't be enough work to go around. Who is in a better position to know the workload than the judges themselves?

Given that it seems so clear additional judges aren't needed, why then would this President nominate not one, not two, but three more judges to this court? Why would the President make an aggressive push to confirm judges that aren't needed? Remember, these judgeships come at a cost of roughly $1 million per judge, per year, and these are lifetime appointments. So that is $1 million per year, for a lifetime appointment.

Unfortunately, we know the answer. The other side hasn't been shy about the reasons.

Four of the active judges on the court were appointed by Republican presidents, and four were appointed by Democrat presidents. But senior Members of the Senate majority have said they need to "switch the majority" on the court.

So why is that? Why would they be intent upon switching the majority?

Well, as one of the President's prominent allies put it, "The President's best hope for advancing his agenda is through executive action, and that runs through the D.C. Circuit."

And we have all heard the President pledge that if Congress doesn't act, then he will simply go around it through executive order. But, of course, that strategy works only if the D.C. Circuit rubber stamps those executive actions.

So, Mr. Chairman, that is a cynical and ideologically driven approach to one of our nation's most respected courts. And it is not how we should be making decisions to spend millions of dollars on lifetime appointments.

I have offered a fair solution to this problem. The Court Efficiency Act would remove one seat from the D.C. Circuit entirely, therefore saving the taxpayers money. It would then reallocate two other seats to circuits where they are needed, the Second and the Eleventh.

Importantly, unlike in 2008, this legislation would take effect immediately. In practical terms, this means that President Obama would still be able to make these appointments. He simply makes them to circuits where they are, in fact, really needed.

Mr. Chairman, you titled this hearing, "Are More Federal Judges Always the Answer?" Based upon the objective criteria that I have discussed here today, the answer to that question is clearly no.

For that reason, instead of focusing on confirming judges who aren't needed, and in the process wasting millions of dollars in taxpayer money, we should be looking for smart ways to reallocate our judicial resources.

So, thank you again, Mr. Chairman, for this opportunity.

[The prepared statement of Senator Grassley follows:]

Prepared Statement of the Honorable Charles E. Grassley, a U.S. Senator from the State of Iowa, and Ranking Member, Senate Committee on the Judiciary

Mr. Chairman, Ranking Member Conyers, and Members of the Committee, thank you for the opportunity to be here.

Our federal judiciary is special. I have tremendous respect for it.

We need to preserve and protect it. And we need to strengthen it.

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Let me emphasize two important points about that effort.

First, Republicans worked to remove a seat from the D.C. Circuit *while a Republican occupied the White House*.

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In other words, we *took away* from President Bush the opportunity to make that nomination. But we *did not* give him an opportunity to make an additional nomina-

tion in the 9th Circuit. Instead, we delayed that authority until a new President could make that nomination.

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"I do not believe the current caseload of the D.C. Circuit or, for that matter, the anticipated caseload in the near future, merits additional judgeships at this time. . . . If any more judges were added now, there wouldn't be enough work to go around."

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Given that it seems so clear additional judges aren't needed, why would the President nominate not one, not two, *but three* more judges to this court?

Why would the President make such an aggressive push to confirm judges that aren't needed? Remember, these judgeships come at a cost of roughly *$1 million per judge, per year*. And these are lifetime appointments. That is $1 million *per year*, for a *ifetime* appointment.

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Well, as one of the President's prominent allies put it, "the president's best hope for advancing his agenda is through executive action, and that runs through the D.C. Circuit."

And, we have all heard the President pledge that if Congress doesn't act, then he will simply go around it through executive order. But of course, that strategy works *only if* the D.C. Circuit rubber stamps those executive actions.

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Mr. Chairman, you titled this hearing, "Are More Federal Judges Always the Answer?" Based on the objective criteria that I've discussed here today, the answer to that question is clearly No.

For that reason, instead of focusing on confirming judges who aren't needed—and in the process wasting millions of dollars in taxpayer money—we should be looking for smart ways to reallocate our judicial resources.

Thank you again, Mr. Chairman, for the opportunity to be here.

Mr. GOODLATTE. Thank you very much, Senator. Depending on your schedule, you are welcome to stay or go, because I know you have a number of other commitments. But if you can remain to take questions, we would love to have you stay.

Senator GRASSLEY. Thank you.

Mr. GOODLATTE. But we will leave that to your discretion.

Senator GRASSLEY. I have to go.
Mr. GOODLATTE. Thank you, Senator.
Senator GRASSLEY. Thank you.
Mr. GOODLATTE. Ambassador Gray, welcome.

Let me say to the other Members of the Committee, Ambassador Gray has testified before this Committee on a number of other occasions, and I had the honor of meeting with him when I led a congressional delegation to Europe, to Brussels, and met with him when he was our ambassador to the European Union.

So, it is good to see you again.

TESTIMONY OF C. BOYDEN GRAY, FORMER WHITE HOUSE COUNSEL, GEORGE W. BUSH, BOYDEN GRAY & ASSOCIATES PLLC

Ambassador GRAY. Thank you very much, Mr. Chairman, for this opportunity to address this question of the D.C. Circuit. I am not going to talk about the caseload numbers that Senator Grassley just referred to. I think Carrie Severino is going to look at that more carefully.

I do want to point out, though, the answer of one of the D.C. Circuit judges to a question posed in a questionnaire by Senator Grassley. "If any more judges were added now, there wouldn't be enough work to go around." I think it is pretty clear that the view on our side is that this is an attempt to tilt the outcomes of this court, and that is not good for the kind of impartiality that the public is entitled to.

But I wanted to devote a little bit of time and what my testimony addresses are the other ways in which adding judges when they are not needed in a way that politicizes the process undermines the collegiality which is necessary for reasoned decision-making and careful thought.

Now, you may ask me for a definition of collegiality, and of course it is working through issues in a common fashion, but perhaps it might be contrasted with what happens when you don't have it, and that is what the D.C. Circuit was like when I first came to Washington. It was, as Felix Frankfurter observed, "a collectivity of fighting cats." Judge Harry Edwards, who rescued—a Democratic nominee who rescued the D.C. Circuit from this collectivity of fighting cats has written that it was not uncommon when he first arrived for one of his colleagues to say, "Can I count on your vote?" It sort of evokes what Senator Reid said, that we need one more on the D.C. Circuit, one more from his side, as it were.

I think that this is a bad thing to get back into. Judge Edwards changed the rules, worked to improve collegiality. He was very successful, and it was followed with great success by Judge Ginsberg later, Judge Sentelle now, Judge Merrick Garland. It is marked in part by a lack of en banc reviews where you have a lot of second-guessing. The D.C. Circuit discourages that because they like to think that the panels can get it right and the panels don't matter in terms of the make-up of the political appointment.

Judge Edwards has written that he witnessed occasions when ideology took over and effectively destroyed collegiality because the confirmation process promoted ideological commitment. This is what I think your Committee is wise to point out should not be al-

lowed to reassert itself after so many years of settled administrative law-making.

The Federal Judicial Center has identified nine as about the limit of how big a court should be. Beyond that, you have fragmentation. You have the law of the panel rather than the law of the circuit. It is very hard as a practitioner to understand exactly how to shape behavior, how to recommend, how to advise on behavior if you have an unpredictable court, and too many judges makes for unpredictability and lack of coherence.

I think that Senator Schumer I think hit the nail on the head when he said we will fill up this court in one way or another, but it is based on the premise that somehow this court, the way it has operated, has overruled or reversed or blocked the current White House more than previous White Houses, and this is just an erroneous assumption.

The data show quite clearly that President Bush in his 8 years was overruled at a higher rate than Obama was in his first term, President Obama was in his first term, 16.7 percent. And this reversal rate has been pretty steady over the last two or three decades, and I don't think it is worth risking the collegiality and the reasoned decision-making that we have enjoyed. Witness Judge Tatel's very nice comments about Judge Sentelle on his retirement. The only point can be to change the end result, and that is not a permissible reason for making appointments.

Thank you.

[The prepared statement of Ambassador Gray follows:]

Hearing before the
U.S. House of Representatives
Committee on the Judiciary

"ARE MORE JUDGES ALWAYS THE ANSWER?"

October 29, 2013

Statement of Amb. C. Boyden Gray

I am honored to have been invited to testify before the Judiciary Committee on the subject of federal judgeships. Having clerked for Chief Justice Earl Warren early in my career, worked on judicial selection in the White House, and practiced in the federal courts throughout decades of private practice, I am keenly aware of the challenges facing the federal judiciary and the importance to the nation of enabling our courts to operate to their maximum potential. In particular, my work as a regulatory lawyer both in the government (in the White House and in Brussels) and in private practice has frequently brought me into contact with the judges and decisions of the United States Court of Appeals for the D.C. Circuit. Though I don't always agree with its opinions, my appreciation for that court and its unique character and docket is unflagging.

It was therefore with some concern that I learned of President Obama's sudden decision in his second term to simultaneously nominate three new judges to the D.C. Circuit.[1] If those nominations were to be confirmed, President Obama would inflate the court to 138% of its current roster of active judges. Such a radical remake of the court might be justified if the court's workload were increasing, but the opposite is true. I can only conclude that President Obama, who did not pay much attention in his first term to the D.C. Circuit, has made tilting the court's political balance a high priority for his second term.

[1] *See* Press Release, Remarks by the President on the Nominations to the U.S. Court of Appeals for the District of Columbia Circuit, June 4, 2013, *available at* http://www.whitehouse.gov/the-press-office/2013/06/04/remarks-president-nominations-us-court-appeals-district-columbia-circuit.

It's an unfortunate strategy for several reasons. First, the D.C. Circuit (smaller than all but one of its twelve sister circuits) doesn't need any more judges. In response to a survey by Senator Grassley, one judge on the court wrote that "[i]f any more judges were added now, there wouldn't be enough work to go around."[2] Another concluded that

> the Court does not need additional judges for several reasons. For starters, our docket has been stable or decreasing, as the public record manifests. Similarly, as the public record also reflects, each judge's work product has decreased from thirty-some opinions each year in the 1990s, to twenty-some, and even fewer than twenty, opinions each year since then.[3]

These statements by sitting D.C. Circuit judges are confirmed by statistics provided by the court's Chief Judge, Merrick Garland, who was appointed to the court by President Clinton. Over the past decade the number of argued cases per active judge has fallen, and the court's six senior judges do more to lighten that already light burden than their counterparts on other courts, who tend to be older and hear fewer cases.[4]

The President's recent nomination spree risks politicizing an institution that is—and should be—above politics. The D.C. Circuit hears some of the most important and least glamorous cases in the federal judiciary.[5] In addition to the ordinary civil and criminal appeals it hears from decisions of the district court, the D.C. Circuit more than any other court considers petitions for review of federal agency actions—administrative rules and orders that

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[2] Press Release, D.C Circuit Court Caseload Doesn't Merit Filling Seats, Senator Chuck Grassley of Iowa, July 24, 2013, *available at* http://www.grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=47016.

[3] *Id.*

[4] *Id.* ("According to one of the judges on the court, the senior judges 'will more than likely serve for another decade based on their respective ages and health.' ¶ Likewise, another judge noted that the D.C. Circuit has 'an extraordinary number of sitting senior judges (six) who are actually younger than the average age of U.S. senior judges.' ¶ Based on this, it is clear that the senior judges on the court are contributing a significant amount of work, and will continue to do so for the foreseeable future. They serve because they want to, not because they have to.").

[5] Regarding the D.C. Circuit's unglamorous regulatory docket, Judge Henry Friendly famously remarked, that the D.C. Circuit is a "court of special importance for administrative law," and "has attracted—*doubtless to the delight of the other circuits*—the largest share of environmental litigation and review of orders of the Federal Power Commission fixing natural gas rates." Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1311 (1975) (emphasis added).

affect the lives and businesses of all Americans. To its great credit, the D.C. Circuit has, for the past two decades at least, fulfilled this important role thoughtfully, quietly, and without political rancor—in short, with collegiality, an institutional trait that manifests itself, D.C. Circuit Judge Harry Edwards has written, when "judges have a common interest, as members of the judiciary, in getting the law right, and . . . as a result . . . are willing to listen, persuade, and be persuaded, all in an atmosphere of civility and respect."[6] Thus, "collegiality mitigates judges' ideological preferences and enables us to find common ground and reach better decisions. In other words, the more collegial the court, the more likely it is that the cases that come before it will be determined on their legal merits."[7] The collection of qualities that give rise to collegiality on an appellate court may be difficult to define, and its precise effects on decisionmaking may be hard to quantify, but judges themselves universally acknowledge collegiality to be an important ingredient in the judicial process.

This has been stressed by the Fourth Circuit's Judge Wilkinson, who noted that although "[c]ollegiality is one of those soft, intangible words which may ring hollow upon the congressional ear," "[j]udges . . . have a deep conviction that a collegial court does a better job."[8]

Collegiality of this sort does not happen by accident; sadly it does not characterize all of our courts of appeals. Indeed, it has not always characterized the D.C. Circuit, which Justice

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[6] Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1645 (2003).

[7] *Id.* at 1640–41.

[8] J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, 43 EMORY L.J. 1147, 1173 (1994) (citing Jon O. Newman, *1,000 Judges–The Limit for an Effective Federal Judiciary*, 188 JUDICATURE 187, 188 (1993); Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70, 70); *see also Responding to the Growing Need for Federal Judgeships: The Federal Judgeship Act of 2009* (Sept. 30, 2009) (statement of the Hon. Gerald Bard Tjoflat, Circuit Judge, United States Court of Appeals for the Eleventh Circuit), at 4 ("Close interpersonal relationships facilitate the creation of higher-quality judicial opinions. Those relationships also form the basis for interaction and continued functioning when a court faces the most emotional and divisive issues of the day.").

Felix Frankfurter once called "a collectivity of fighting cats."[9] Judge Edwards, who was nominated to the court by President Carter in 1979 and confirmed in 1980, reports that in those days the court was divided into "ideological camps," and "judges of similar political persuasions too often sided with one another . . . merely out of partisan loyalty, not on the merits of the case."[10] Judge Edwards reports that one liberal judge's first words to him were "Can I count on your vote?"[11]

Not surprisingly, Judge Edwards found that judges working in this atmosphere "become distrustful of one another's motivations; they are less receptive to ideas about pending cases and to comments on circulating opinions; and they stubbornly cling to their first impressions of an issue"—all tendencies that "do damage to the rule of law."[12]

Harry Edwards assumed the D.C. Circuit's chief judgeship in 1994 at a time when "collegiality was at a low point."[13] He led a reform of the court and its rules and procedures that prioritized collegiality.[14] The cultural shift that Judge Edwards brought about on the court has persisted through the intervening years thanks in large part to the Chief Judges who succeeded him in that role—Douglas Ginsburg, David Sentelle, and now Merrick Garland. Judge David Tatel, a Clinton appointee, said of Chief Judge Sentelle, a Reagan appointee, that "[i]n his five years as our Chief Judge, Dave has protected our proudly nurtured tradition of collegiality,

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[9] JEFFREY BRANDON MORRIS, CALMLY TO POISE THE SCALES OF JUSTICE: A HISTORY OF THE COURTS OF THE DISTRICT OF COLUMBIA CIRCUIT 197 (2001) (quoting Letter from Felix Frankfurter to Philip B. Kurland, Professor, University of Chicago Law School (1962)), *quoted in* Edwards, *supra* note 6.

[10] Edwards, *supra* note 6, at 1648.

[11] *Id.*

[12] *Id.* at 1649.

[13] *Id.* at 1665.

[14] Judicial Conference of the Second Circuit, 243 F.R.D. 492, 564 (2006) (R.B. Ginsburg, J.) ("I can give as a bright example the Court of Appeals on which I served for 13 years, the D.C. Circuit, which was once a fairly divided circuit. Nowadays there's barely ever a dissent. Harry Edwards, as Chief Judge, turned that court around. It is today a very collegial court."). *See generally* Aaron Zelinsky, "Collegiality, Judging, and the D.C. Circuit," CONCURRING OPINIONS (May 13, 2013), http://www.concurringopinions.com/archives/2013/05/collegiality-judging-and-the-d-c-circuit.html.

navigating sometimes sensitive waters with a firm but gentle oar."[15] Following Judge Edwards's lead, each successive chief judge made the collegiality of the court a priority. In a speech delivered in 2011 and published last year, Judge Ginsburg agreed that "the level of collegiality has increased steadily over the years and continues to be a robust and pleasant feature of service on the court."[16]

The collegiality that the D.C. Circuit's judges—appointed by presidents of both parties—have labored so hard to achieve would be threatened if the President succeeds in his effort to force three unneeded judges through the confirmation process. First, judges who sense they are appointed to prop up the President's regulatory agenda, may be more likely to do so out of loyalty to the President who appointed them. In his early years on the court, Judge Edwards "witnessed occasions when ideology took over and effectively destroyed collegiality, because the confirmation process 'promoted' ideological commitment."[17] As proponents of the nominations have pointed out, it is no accident that Obama's judicial nomination barrage followed his State of the Union promise that "if Congress won't act" on climate change, "I will."[18] And whereas "a single new judge has no real standing or authority to undo the norms of collegiality," three judges nominated contemporaneously with a single political agenda in mind may feel pressure to fulfill that agenda at the expense of the institution's collegial character, as

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[15] Judge David S. Tatel, *Remarks on the Occasion of the Portrait Hanging Ceremony for the Honorable David B. Sentelle* (Apr. 5, 2013), *available at* http://www.concurringopinions.com/wp-content/uploads/2013/05/Sentelle_Portrait-Remarks-11.pdf.

[16] Hon. Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 Georgetown J. of L. & Pub. Pol'y 1 (2012).

[17] Edwards, *supra* note 6, at 1677-78; *see also id.* at 1678 ("In other words, if an appointee joins the court feeling committed to the political party that ensured the appointment, the judge's instinct may be to vote in a block with other perceived conservatives or liberals. Even worse, a judge who has been put through an ideologically driven confirmation ordeal may take the bench feeling animosity toward the party that attempted to torpedo the appointment on ideological grounds.").

[18] *See* Doug Kendall & Simon Lazarus, *Broken Circuit*, THE ENVTL. FORUM 36 (May/June 2013), *available at* http://theusconstitution.org/sites/default/files/briefs/The%20Environmental%20Forum%20-%20Broken%20Circuit.pdf.

Judge Edwards has observed. (Notably, President Obama's first successful nominee to the D.C. Circuit, Judge Srinivasan, was confirmed without a single 'no' vote in either the Judiciary Committee or the full Senate.)

Finally, bloating the bench would undermine the close working relationship that contributes to collegiality on a small court. Judge Edwards has noted that "smaller courts tend to be more collegial," because "smaller groups have the potential to interact more efficiently, making close and continual collaboration more likely."[19]

"It stands to reason," wrote Judge Edwards, "that the larger the court, the less frequently any two judges sit together and interact with each other. . . . [I]t is easier to achieve collegiality on a court with twelve members than on one with twenty or thirty. It is easier for judges to keep up and become familiar with each other."[20] Thus, "[t]he appointment of more judges to handle growing caseloads does not come without substantial costs."[21]

Of course, the same principle applies on the other side of the Potomac. As Harvie Wilkinson put it when he was Chief Judge of the Fourth Circuit, "[c]ollegiality may be the first casualty of expansion on the federal appellate courts"[22]:

> [O]ne engages in more fruitful interchanges with colleagues whom one deals with day after day than with judges who are simply faces in the crowd . . . . Smaller courts by and large encourage more substantial investments in relationships and in the reciprocal respect for differing views that lie at the heart of what appellate justice is about.[23]

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[19] Edwards, *supra* note 6, at 1675; *see also id.* ("I have always believed that it is easier to achieve collegiality on a court with twelve members than on one with twenty or thirty. It is easier for judges to keep up and become familiar with each other. Smaller groups have the potential to interact more efficiently, making close and continual collaboration more likely.").

[20] *Id.*

[21] *Id.*

[22] Wilkinson, *supra* note 8, at 1173, *quoted in* Edwards, *supra* note 6, at 1675.

[23] *Id.* at 1173-74; *accord* Tjoflat, *supra* note 8, at 2-3 ("[J]udges in small circuits are able to interact with their colleagues in a much more expedient and efficient manner than judges on jumbo courts."). Judge Wilkinson

Other judges have voiced similar concerns about the inverse relationship between court size and collegiality. Judge Gerald Tjoflat served on the old Fifth Circuit before it was split into the new Fifth Circuit and the Eleventh Circuit on which he now sits. Judge Tjoflat's testimony before the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts confirms the risks inherent in large courts. By comparison to a larger court, he found that "the close ties that can be forged on a smaller court allow you to build trust in your colleagues."[24] The impaired collegiality of a large court, Judge Tjoflat found, affects its work:

> Having served on both the former Fifth Circuit and now the Eleventh Circuit, that I can definitively attest that the entire judicial process—opinion writing, en banc discussions, emergency motions, circuit administration, and internal court matters—runs much more smoothly on a smaller court.[25]

A 1993 report commissioned by the Federal Judicial Center agreed that "[a]bove a certain size, collegial appellate courts do not operate effectively."[26] And in 1964, the same Judicial Conference committee that recommended splitting the old Fifth Circuit concluded that "nine is the maximum number of active judgeship positions which can be allotted to a court of appeals without impairing the efficiency of its operation and its unity as a judicial institution."[27] The D.C. Circuit, with eight active judges is dangerously close to the line.

The threat to collegiality that is posed by bench bloat are not merely hypothetical. Some argue that we see its effects in larger courts like the Sixth Circuit with its 28 active and

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discusses other side effects of bench bloat that are worthy of this body's attention. These include federal jurisdiction creep and corresponding encroachment into the traditional jurisdiction of the states, *see id.* at 1165 ("The more judges there are, the more jurisdiction will be assigned them and the more federal rulings will be handed down. The sphere of federal law will gradually but inevitably expand at the expense of the law of the states."), and reduction of judicial quality, *id.* at 1167-68.

[24] Tjoflat, *supra* note 8, at 4; *see also* Judge Gerald Bard Tjoflat, *More Judges, Less Justice*, 79 A.B.A.J. 70, 70 (July 1993).

[25] Tjoflat, *supra* note 8, at 5.

[26] GORDON BERMANT, ET AL., FEDERAL JUDICIAL CENTER, IMPOSING A MORATORIUM ON THE NUMBER OF FEDERAL JUDGES: ANALYSIS OF ARGUMENTS AND IMPLICATIONS (1993).

[27] REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14-15 (1964).

senior judges.[28] At least one member of that court attributed in part its "decline in collegiality" to "increase in numbers."[29] Similarly, many have called for the Ninth Circuit to be split into two circuits, precisely because of the negative effects that such a large bench (*i.e.*, 29 seats) has on collegiality. As the Ninth Circuit's Judge Diarmuid O'Scannlain testified a few years ago before a subcommittee of this Committee:

> The sheer magnitude of our court and its responsibilities negatively affects all aspects of our business, including our celerity, our consistency, our clarity, *and even our collegiality*. Simply put, the Ninth Circuit is too big. It is time now to take the prudent, well-established course and restructure this circuit. Restructuring large circuits is the natural evolution of judicial organization. Restructuring has worked in the past. Restructuring will work again.[30]

Simply put, without a growing caseload to justify new appointments, there is no reason to invite the risk of factionalism inherent in larger courts.

Closely related to bench bloat's effect on collegiality is its harmful effect on the coherence of circuit law. In our system, an appellate decision is binding not only on district courts within the circuit, but on future panels of the circuit court. It is a simple rule to state, but often a challenging one to follow, especially when the precedent a panel is bound to follow is one it would have decided differently in the first instance. The en banc process impose some measure of discipline on judges who might otherwise violate the principle of *stare decisis*, but courts can only rehear so many cases en banc. The consistency of circuit law depends primarily upon each judge's loyalty to the institution of the court and his respect for his fellow judges.

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[28] *See, e.g.*, Adam Liptak, *Weighing the Place of a Judge in a Club of 600 White Men*, N.Y. TIMES (May 16, 2011) ("[T]he United States Court of Appeals for the Sixth Circuit . . . is surely the most dysfunctional federal appeals court in the nation."); Approval of the Minutes of the June 14, 2001 Executive Session of the Second Circuit, 221 F.R.D. 38, 229 (2002) ("We have all read about the problems with collegiality in the Sixth Circuit."). *But see* Ronald Lee Gilman, *Rookie Year on the Federal Bench*, 60 OHIO ST. L.J. 1085, 1093 (1999) ("I am happy to report that a high degree of collegiality in fact exists on the Sixth Circuit Court of Appeals. All members of the court have been uniformly courteous and respectful.").

[29] Lauren K. Robel, *Private Justice and the Federal Bench*, 68 IND. L.J. 891, 906 n.60 (1993).

[30] *Ninth Circuit Court of Appeals Judgeship and Reorganization Act of 2003: Hearing on H.R. 2723 Before the Subcomm. On Courts, the Internet, and Intellectual Property of the H. Comm. On the Judiciary* (Oct. 21, 2003) (statement of Judge Diarmuid F. O'Scannlain), at 2, *available at* http://judiciary.house.gov/legacy/oscannlain102103.pdf.

And, as we have seen, mutual respect is characteristic of small courts. "Simply as a matter of probability, there is a much greater chance on a smaller circuit that a sitting panel will contain at least one judge who sat on a prior case that is under discussion, and is familiar with that case and committed to it." As a court grows, individual members sit together on panels less frequently and are less likely to have been involved in the precedent they are bound to follow. Again, Judge Wilkinson:

> As the number of judges rolls ever upward, the law of the circuit will become more nebulous and less distinct. Indeed, it is likely that the law of the circuit will be replaced by the law of the panel. Judicial decisions may come to be viewed as resolving only that day's dispute. Litigation will become more a game of chance and less a process with predictable outcomes.[31]

This tendency is self perpetuating. "Under the law of the panel—as opposed to the law of the circuit—trial judges lack clear guidance from the circuit bench, and appellate dispositions may begin to assume for those judges a haphazard and ad hoc quality."[32] As the law of the circuit becomes less predictable, its precedents less firmly rooted, and its roster of potential panelists longer, litigants will more likely to roll the dice on appeals that formerly would not have stood a chance.

The erosion of a consistent law of the circuit is no mere academic problem. Judge Tjoflat has observed that "[a]s the law becomes unclear and unstable, our citizens—whether individuals or entities like corporations—lose the freedom that inheres in a predictable and

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[31] Wilkinson, *supra* note 8, at 1176; *see also* Tjoflat, *supra* note 8, at 1-2 ("In increasing the size of a court of appeals, the Congress must consider the effect the increase has on (1) the court's efficiency, and (2) the stability of the rule of law in the circuit. My experience—and that of others who have given the subject considerable study and thought—is that the increase in circuit court judgeships negatively affects both these areas.").

[32] *Id.*

stable rule of law."[33] Thus, "[t]he demand for more judges, if satisfied, will inexorably lead—little by little—to the erosion of the freedoms we cherish."[34]

The effect of inconsistent circuit law would be especially pernicious on the D.C. Circuit. The D.C. Circuit is the nation's premier administrative law court, and the other courts of appeals frequently rely on its expertise in the regulatory arena. If the D.C. Circuit cannot speak with one voice, our entire system of administrative law will be in jeopardy.

It is clear that many proponents of the President's suddenly aggressive nominations effort see this as nothing more than an opportunity to stack the court with nominees of the President's choosing, in an attempt to substantially change the ideological composition of the court. As my fellow panelist, Carrie Severino, has reported, Senator Schumer recently listed D.C. Circuit cases he disliked at a fundraising dinner and promised the assembled donors, "[w]e will fill up the D.C. Circuit one way or another."[35] Such a strategy risks undermining the collegiality that has been the court's trademark for decades, as I've explained.

But just as importantly, that strategy rests on a false premise. The D.C. Circuit has not treated the current Administration any more negatively than it has prior Administrations. While the court has received substantial criticism in the *New York Times* and *Washington Post* after ruling against federal agencies in a small handful of hot-button cases,[36] such criticism is wildly overstated. According to the federal courts' statistics, the D.C. Circuit reversed administrative agencies in 16.7 percent of cases it decided during the 2009-2012 reporting

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[33] Tjoflat, *supra* note 8, at 11.

[34] *Id.*

[35] *Is the Administration Trying to Stack the D.C. Circuit*, CHARLESTON DAILY MAIL, Oct. 25, 2013, http://www.dailymail.com/Opinion/Commentary/201310240127.

[36] *See, e.g.*, Floyd Norris, *Circuit Court Needs to Let the S.E.C. Do Its Job*, N.Y. TIMES, Sept. 21, 2012, at B1; Ben Protess, *As Wall Street Fights Regulation, It Has Backup on the Bench*, N.Y. TIMES, Sept. 25, 2012, at F2; Steven Pearlstein, *Regulatory failure? Blame the D.C. Circuit*, WASH. POST, Apr. 9, 2010. *But see* Eugene Scalia, *Why Dodd-Frank Rules Keep Losing In Court*, WALL ST. J., Oct. 3, 2012.

years. From 2001-2008, it reversed the administrative agencies in 18.8% of the cases it decided.[37] The court continues its work, steadily and nonideologically, from one administration to the next. It would be a tragic mistake to risk upsetting this record by shooting for a single digit or near-zero reversal rate.

[37] The underlying statistics are available at http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics.aspx. Specifically, they are drawn from Table B-5 of each annual report. Note that as of 2012, these statistics "now present data on cases disposed by consolidation. Prior to 2012, these tables did not provide such data." http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-courts-of-appeals.aspx.

Mr. COBLE [presiding]. Thank you, Ambassador Gray.
Ms. Aron, you are recognized.
Ms. Aron, your mic needs to be activated.

TESTIMONY OF NAN ARON, PRESIDENT, ALLIANCE FOR JUSTICE

Ms. ARON. Thank you very much for the opportunity to address a very important topic: the ability of our Federal courts, the envy of the world, to efficiently, effectively, and fairly administer justice for the people of the United States.

The Committee has posed the question, "Are More New Judges Always the Answer?" I am not sure I can speak to the word "always," but I can say without hesitation that today, with more than 1 of 10 judgeships vacant, with caseloads rising rapidly, and with the complexity of litigation increasing, the answer to your question is yes, more judges are the answer. In fact, we strongly concur with the judgment of the Judicial Conference of the United States and the Chief Justice of the United States that additional judgeships should be created in many parts of the country in order to ensure that the Constitution's promise of justice is fulfilled.

But the need for Congress to create new judgeships aside, we believe the first step in resolving the crisis in our courts is to fill all the existing district and circuit court seats.

As of today, there are 91 total vacancies. Astonishingly, there are more empty judgeships now than when President Obama took office almost 5 years ago. In fact, just among the states that are home to Members of this Committee, there are a total of 66 open seats. Strikingly, 34 of those seats are considered judicial emergencies by the Administrative Office of the U.S. Courts, meaning these courts are so overwhelmed they cannot function properly.

This crisis has real-world consequences for real people. When your constituents go to court, they face a judicial system that is overburdened, overworked, understaffed, and underfunded. Cases are delayed interminably. Decisions are rushed. Because of burgeoning criminal caseloads, which must take priority, civil actions are shoved aside. Small businesses can't get resolution to problems that tie their enterprises into knots. Contract disputes go unresolved. Individuals seeking justice for discrimination, or fraud, or disputes with banks or business or the government, are left hanging, often for years.

Every American deserves his or her day in court. In the circuit courts of appeals, cases are bigger, the stakes are higher, and the consequences for all of us are more significant, and that fact is doubly true for the D.C. Circuit Court of Appeals.

There are currently three vacancies out of 11 seats on the court that is often described as the second most important court in the country. The court shouldn't be forced to do its job with 27 percent of its seats empty. It is like telling a football team they can only use eight players on Sunday, instead of 11. The court can ill-afford to have this critical component of our judicial system send less than a full team to the game.

These are the facts. With the unique responsibilities to oversee the actions of Federal agencies, the D.C. Circuit handles some of the most complex, lengthy, sensitive litigation in the Federal

courts. Because of this unique caseload, when there were only eight seats filled in 2003, Senator Orrin Hatch called this a crisis situation.

But in addition to the special nature of its cases, the plain fact is that this court's workload has increased significantly in recent years.

With only eight of 11 seats filled, the caseload is currently at 185 cases per active judge. In 2003, when John Roberts was confirmed to the Circuit, that left 111 cases per active judge. In 2005, the confirmation of Judges Brown and Griffith resulted in 119 cases per active judge. Even if all three seats were filled tomorrow, the cases per active judge would be 134.

Given the stresses on the D.C. Circuit and the importance of its legal mission, we are pleased that President Obama has put forward a full slate of outstanding, well-qualified nominees. When there are vacancies on the Federal court, the president is required to nominate new judges, subject, of course, to the advice and consent of the Senate. Article II, Section 2 of the Constitution is crystal clear on this matter. The President cannot ignore his constitutional obligations, and neither should the Senate.

Mr. Chairman, new judges, whether those named to fill existing vacancies or those chosen to serve in entirely new seats, are indeed the answer if the question we ask is: Will justice be done in the United States of America?

Thank you very much.

[The prepared statement of Ms. Aron follows:]

Testimony by Nan Aron, President, Alliance for Justice
United States House of Representatives
Committee on the Judiciary
October 29, 2013

Mr. Chairman, thank you very much for this opportunity to address a very important topic: the ability of our federal courts—the envy of the world—to efficiently, effectively, and fairly administer justice for the people of the United States.

The committee has posed the question, "Are More New Judges Always the Answer?" I'm not sure I can speak to the word "always," but I can say without hesitation that *today*, with more than one of ten judgeships vacant, with caseloads rising rapidly, and with the complexity of litigation increasing, the answer to your question is yes, more judges are the answer. In fact, we strongly concur with the judgment of the Judicial Conference of the United States and the Chief Justice of the United States that additional judgeships should be created in many parts of the country in order to ensure that the Constitution's promise of justice is fulfilled.

But the need for Congress to create new judgeships aside, we believe the first step in resolving the crisis in our courts is to fill all the *existing* district and circuit court seats.

As of today, there are 91 total vacancies—74 in district courts and 17 in circuit courts. Astonishingly, there are more empty judgeships now than when President Obama took office, almost five years ago. In fact, just among the states that are home to members of this committee, there are a total of 66 open seats. Strikingly, 34 of those are considered "judicial emergencies" by the Administrative Office of the United States Courts, meaning those courts are so overwhelmed that they can no longer function properly. In fact, 92 percent of all judicial emergencies in the country are located in states represented on this committee.

This crisis is not an abstract problem. It has real-world consequences for real people. When your constituents go to court, they face a judicial system that is overburdened, overworked, understaffed, and underfunded. Cases are delayed interminably. Judges complain they can't spend the time they need on individual cases to render the best possible opinions. Decisions are rushed. Because of burgeoning criminal caseloads, which must take priority, civil actions are shoved aside. Small businesses can't get resolution to problems that tie their enterprises in knots. Contract disputes go unresolved. Individuals seeking justice for discrimination, or fraud, or disputes with banks or businesses or the government, are left hanging, often for years.

Every American deserves their day in court. The Constitution explicitly says one of its major purposes is to "establish Justice." Every American has a right to expect that the remedies that the law provides are available to them in a reasonable time, and not dangled out as some faint hope that might someday be within reach, assuming a judge can even be found to hear their case.

But the issues of dysfunction and delay, of overwork and too few resources, become even more disturbing the higher up in the federal system you go. In the circuit courts of appeals the cases are bigger, the stakes are higher, and the consequences for all of us are more significant.

And that fact is doubly true for the U.S. Court of Appeals for the D.C. Circuit.

There are currently three vacancies out of 11 seats on the court that is often described as the second most important in the country. The court, the importance of which is rivaled only by the Supreme Court, shouldn't be forced to do its job with 27 percent of its seats empty. It's like telling a football team they can only use eight players on Sunday, instead of 11. The country can ill-afford to have this critical component of our judicial system send less than a full team into the game.

These are the facts: The D.C. Circuit handles some of the most complex, lengthy, sensitive litigation in the federal courts. Its cases are characterized by long trials, multiple plaintiffs and defendants, armies of lawyers, massive records, and long, technical opinions. Those indisputable facts alone make it essential to fully staff this court. In fact, I recall in 2003, when, just like today only eight seats were filled, Senator Orrin Hatch called that a "crisis situation."

The D.C. Circuit is the federal appeals court that most closely oversees the actions of federal agencies on topics like the environment, consumer protections, workers' rights, banking regulations, and other vital issues. It digs deeply into central disputes over how the government functions. As Chief Justice John G. Roberts, Jr., himself a former member of the D.C. Circuit, explained in a 2005 lecture—"What Makes the D.C. Circuit Different?"—the court has a "special responsibility to review legal challenges to the conduct of the national government." And, despite its name, its decisions reach far beyond the District of Columbia, to touch every single American in every corner of the country. It makes no sense to shortchange the court that handles some of the toughest cases with the biggest impacts.

But in addition to the special nature of its cases, the plain fact is that the court's workload has increased significantly in recent years.

In 2003, when John Roberts was confirmed to the ninth seat on the D.C. Circuit, there were 1,001 pending cases. In 2005, when President Bush put forward Janice Rogers Brown and Thomas Griffith for the tenth and eleventh seats, there were 1,313 pending cases. And today, the trend upward continues, with 1,479 pending cases.

With only eight of 11 seats filled, the caseload is currently at 185 cases per active judge. In 2005, when John Roberts moved up to the Supreme Court—his seat is *still* vacant, by the way—1,313 cases were divided among the full complement of 11 judges. That represented 119 cases per judge. Even if all three open seats were filled tomorrow, the cases per active judge will be 134.

The federal judges who have the clearest view of the problem have the clearest answers. Tenth Circuit Judge Timothy Tymkovich, who was appointed by President George W. Bush, heads up the Judicial Conference committee that makes recommendations to Congress on the number of judges needed in the federal system. He recently testified before a Senate Judiciary subcommittee about the D.C. Circuit, and spoke of what he called "the uniqueness of their caseload." He noted, for instance, that the court has "something like 120 administrative appeals

per judgeship panel, versus about 28 for the other Courts of Appeals." He was clear that the way the D.C. Circuit is evaluated must be different from other courts, and concluded unequivocally that "we haven't seen any reason to reevaluate" the size of the court.

Former D.C. Circuit Chief Judge Pat Wald has explained why that's so, writing that "The D.C. Circuit hears the most complex, time-consuming, labyrinthine disputes over regulations with the greatest impact on ordinary Americans' lives ... These cases can require thousands of hours of preparation by the judges, often consuming days of argument, involving hundreds of parties and interveners, and necessitating dozens of briefs and thousands of pages of record—all of which culminates in lengthy, technically intricate legal opinions."

Given the stresses on the D.C. Circuit and the importance of its legal mission, we're pleased that President Obama put forward a full slate of outstanding, highly qualified nominees, which the Senate is now considering. Nominating qualified men and women for vacant judgeships isn't some kind of illegitimate act, as some have inferred. Every president does exactly the same thing. When there are vacancies on the federal bench the president is required to nominate new judges, subject, of course, to the advice and consent of the Senate. Article II, section 2 of the Constitution is very clear on this matter. It's not a negotiable point. The president cannot ignore his constitutional obligations, and neither should the Senate.

I'd like to conclude my testimony by referring to those obligations.

I would respectfully submit that the committee's question, "Are More New Judges Always the Answer," misses the point. The Constitution makes a promise to the American people that our government will function in a way that will "establish Justice." Justice cannot be established, and the rule of law cannot be made manifest, if the federal court system is unable to function because it is starved of judges and resources.

It is the absolute obligation of Congress and the president to ensure that the third branch of government is healthy and fully able to do its job. When your constituents walk into a federal courthouse, they should enter knowing that everything possible has been done to ensure that they have access to the finest judicial system and set of laws in the world. Regrettably, that is not true now. It's not true in the district courts, in the appellate courts, and especially not in the D.C. Circuit.

Mr. Chairman, new judges, whether those named to fill existing vacancies, or those chosen to serve in entirely new seats, are indeed the answer if the question we ask is: will justice be done in the United States of America?

Thank you and I am eager to answer your questions.

Mr. COBLE. Thank you, Ms. Aron.
Ms. Severino, you are recognized.

TESTIMONY OF CARRIE SEVERINO, CHIEF COUNSEL AND POLICY DIRECTOR, JUDICIAL CRISIS NETWORK

Ms. SEVERINO. Thank you. I want to thank Chairman Goodlatte, Ranking Member Conyers, and the distinguished Members of the Committee for the opportunity to speak here today.

This June, the President took the unusual step of staging a Rose Garden announcement highlighting his simultaneous nomination of three individuals to the Court of Appeals for the D.C. Circuit. The President portrayed the D.C. Circuit as a court in crisis. He suggested that the D.C. Circuit was short-staffed, threatening our ability to maintain a fair and functioning judiciary.

But the numbers tell a different story, and it is a story that is broadly recognized by those familiar with the D.C. Circuit. They show it to be the most underworked court in the country, with a caseload that has dropped significantly over the past decade.

There are many ways to measure a court's workload, but they all tell the same story in this case. The most relevant statistic, and the one that forms part of the Administrative Office of the Courts' own formula to gauge workload for determining judicial emergencies, is the number of annual filings per judge. With its current complement of eight active judges, equally balanced between Republican and Democratic nominees, the D.C. Circuit has the lowest number of new filings per judge of any circuit court. This is three to four times fewer than the busiest courts.

The number of cases disposed of per judge is another metric by which to gauge workload. Once more, the D.C. Circuit is the court with the lowest numbers, and the highest numbers are three to four times as many.

One can also look at the number of cases disposed of on the merits. This is an even better gauge of the type of cases that take up the most time for judges. And once again, the D.C. Circuit is dead last. Circuits, including the Eleventh Circuit, have up to five times as many cases as the D.C. Circuit.

Ms. Aron has pointed to the numbers of pending cases on the Circuit. I am happy to talk more about the reason that is not a relevant statistic later, but it broadly just points to the amount of time it takes a case to work through the court, not the amount of time the court itself is spending on it but just the overall length of time.

Every circuit court has a unique balance of types of cases, and the D.C. Circuit is no exception. Its role in hearing many administrative challenges means it does get more than its fair share of complicated regulatory issues, but that hardly makes up for the heavily skewed absolute numbers of cases. The average administrative law case may take longer to work through than the average criminal case, but not three to five times as long.

The statistics cited previously all presume that only the eight active judges are carrying the court's caseload, but that is far from accurate. According to the Chief Judge of the D.C. Circuit, the six senior judges who hear oral arguments together carry a workload equivalent to 3.25 active judges. Adding that to the eight active

judges, those are the full-time equivalent of 11.25 judges serving on the D.C. Circuit currently. That is more than the number of authorized seats on that court.

The judges responding to Senator Grassley indicated that those senior judges were fairly young and healthy on the average and could be expected to serve for another decade.

On an anecdotal level, this all confirms my experience on the D.C. Circuit, which was that we are much less busy than my friends clerking at other circuits at the time.

The President was correct about one thing in his Rose Garden speech: there are courts that are truly short-staffed and in crisis. The Administrative Office of the Courts, taking into account the number and types of cases each circuit hears, has identified eight appellate seats that constitute judicial emergencies. But the D.C. Circuit is nowhere on that list.

The question, then, is: Why did the president choose to make such high-profile nominations to a court that barely has enough work to go around at a time when almost 70 percent of Federal vacancies, including 75 percent of the judicial emergencies, had no nominee? There is no neutral principle that explains his move, suggesting that the timing and manner of the three D.C. Circuit nominations was simply due to politics.

The D.C. Circuit enjoys a unique role as the court that hears the lion's share of cases addressing administrative law and regulatory agencies. Its position as a check on government power puts it in the crosshairs of a president whose governing style is characterized by aggressive use of administrative agencies and an avowed desire to push the envelope to achieve his goals when he has been stymied by Congress. Key Democratic Senators have acknowledged this motivation behind the D.C. Circuit nominations. We heard references to Senator Schumer's comments about filling the D.C. Circuit up one way or another. Senator Harry Reid has also pointed to political reasons to move forward on the president's nominations to the D.C. Circuit, complaining that the court was wreaking havoc in the country. He said, "We are focusing very intently on the D.C. Circuit. We need at least one more. There's three vacancies, we need at least one more and that will switch the majority."

Our nation is struggling to get its financial house in order, and our judiciary is laboring in many places with a shortage of judges. This is not the time to increase the burdens on taxpayers for a court that doesn't need new judges or to divert scarce resources from where they are needed most. The D.C. Circuit has been regularly canceling hearings. We need judges where there are real judicial emergencies.

Congress should instead act to shield the American people from the unnecessary financial burden of funding additional judges simply to facilitate the President's aggressive policy agenda. Thank you.

[The prepared statement of Ms. Severino follows:]

Testimony of

Carrie Severino

Chief Counsel and Policy Director

Judicial Crisis Network

Before the

House Committee on the Judiciary

October 29, 2013

Are More Judges Always the Answer?

This June the President took the unusual step of staging a Rose Garden announcement highlighting his simultaneous nomination of three individuals to the Court of Appeals for the DC Circuit. The president portrayed the D.C. Circuit as a court in crisis. He suggested that the D.C. Circuit was short-staffed, threatening our ability to maintain a fair and functioning judiciary.

But the numbers tell a different story. They show the D.C. Circuit to be the most underworked court in the country, with a caseload that has dropped significantly over the past decade.

There are many different ways to measure a court's workload, but they all tell the same story in this case. The most relevant statistic, and the one that forms part of the Administrative Office of the Courts' own formula to gauge workload, is the number of annual filings per judge. With its current complement of eight active judges, equally balanced between Republican and Democratic nominees, the D.C. Circuit has the lowest number of new filings per judge of any circuit court. By comparison, the Fifth Circuit has more than three times as many cases filed per judge as does the D.C. Circuit, and the Eleventh Circuit over four times as many.

The number of cases disposed of per judge is another metric by which to gauge workload. Once more, the D.C. Circuit is the court with the lowest numbers. The Eleventh Circuit again has more than four times as many cases disposed of annually per active judge as does the D.C. Circuit. The Second, Fifth, and Ninth Circuits all have more than three times as many cases disposed of annually per active judge.

One can also look at the number of cases disposed of on the merits – a better gauge of the type of cases that are taking up the most time for judges. Using that metric, four

other circuits have more than three times as many cases decided on the merits per active judge as does the D.C. Circuit. The Eleventh Circuit, again the workhorse, has nearly five times as many.

Every circuit court has a unique balance of types of cases, and the D.C. Circuit is no exception. Its role in hearing many administrative challenges means it does get more than its fair share of complicated regulatory issues, but that hardly makes up for the heavily skewed absolute numbers of cases. The average administrative law case may take longer to work through than the average criminal case, but not three to five times as long.

Not only is the DC Circuit less busy than it sister courts, it has a low caseload in absolute terms. It officially hears oral arguments in cases between September and May, but for the past several years the court has had to cancel sittings because of a lack of cases.

The D.C. Circuit judges agree. Several provided candid comments in response to questions from Senator Grassley about whether new judges were needed on their court. One even stated that, "If any more judges were added now, there wouldn't be enough work to go around."

Others pointed to the significant contribution of senior judges to keeping up with the court's caseload. The statistics cited previously all presume that only the eight active judges are carrying the court's caseload, but that is far from accurate. According to the Chief Judge of the D.C. Circuit, the six senior judges who hear oral arguments together carry a workload equivalent to 3.25 active judges. Adding that to the eight active judges, there are the full time equivalents of 11.25 judges serving on the D.C. Circuit currently – more than number of authorized seats on that court. The judges responding to Senator

Grassley indicated that those senior judges were fairly young and healthy on average and could be expected to serve for another decade.

On an anecdotal level, my experience clerking at the D.C. Circuit for Judge David Sentelle was consistent with all these statistics. I had friends clerking at other appellate courts across the country, and certainly felt that our workload was light in comparison with theirs.

What's more, the DC Circuit's already-low caseload is actually in decline. Since the 2003-04 term the numbers of cases scheduled for oral argument per active judge has decreased by about 18%. This is remarkable considering the fact that the court currently has only eight active judges, compared to a high of 10 active judges from 2006-08.

The president was correct about one thing in his Rose Garden speech: there are some courts that are truly short-staffed and in crisis. The Administrative Office of the Courts, taking into account the number and types of cases each circuit hears, has identified eight appellate seats that constitute judicial emergencies. But the DC Circuit is nowhere on the list.

The question, then, is: Why did the president choose to make such high-profile nominations to a court that barely has enough work to go around at a time when almost 70% of federal vacancies, including 75% of the "judicial emergencies" had no nominee? There is no neutral principle that explains his move, suggesting that the timing and manner of the three DC Circuit nominations was simply due to politics.

The DC Circuit enjoys a unique role as the court that hears the lion's share of cases addressing administrative law and regulatory agencies. Its position as a check on government power puts it in the crosshairs of a president whose governing style is

characterized by aggressive use of administrative agencies and an avowed desire to "push the envelope" to achieve his goals when he has been stymied by Congress.

Key Democratic Senators have acknowledged this motivation behind the DC Circuit nominations. At a fundraising dinner this March, Sen. Charles Schumer lamented decisions of the court that have enforced legal limits on his preferred political agenda. He criticized cases in which the Court overturned an EPA regulation that lacked statutory authority, found that the SEC was promulgating regulations without performing the required cost-benefit analysis, and insisted that the recess appointment power could only be used when the Senate was officially in recess. In order to roll back the policy results of these decisions, Sen. Schumer vowed that "we will fill up the DC Circuit one way or the other."

Senator Harry Reid has also pointed to political reasons to move forward on the presidents' nominations to the DC Circuit, complaining the court was "wreaking havoc in the country." He stated, "We're focusing very intently on the DC Circuit. We need at least one more. There's three vacancies, we need at least one more and that will switch the majority."

Our nation is struggling to get its financial house in order, and our judiciary is laboring in many places with a shortage of judges. This is not the time to increase the burdens on taxpayers for a court that doesn't need new judges or to divert scarce resources from where they are needed most. Congress should instead act to shield the American people from the unnecessary financial burden of funding additional judges simply to facilitate the president's aggressive political agenda.

Mr. GOODLATTE [presiding]. Thank you, Ms. Severino.

We will now begin the questioning under the 5-minute rule, and I will begin by recognizing myself.

Ms. Severino, in her testimony, Ms. Aron argued that the court needs more judges because it has more pending cases than it did a decade ago. I note that in his response to Senator Grassley, Chief Judge Merrick also included a stat that shows the number of pending cases.

Can you briefly explain the distinction between appeals filed per active judge, appeals pending, and appeals terminated, as well as offer your understanding of which caseload measures the Administrative Office relies upon as most accurately reflecting the workload of individual judges?

Ms. SEVERINO. Certainly. Appeals filed is obviously the number of appeals coming in per active judge, the number of appeals being filed each year, and that is the circuit actually that the Administrative Office of the Courts uses as its baseline for determining whether a judicial emergency exists. So they clearly view that as the most relevant statistic.

The number of cases disposed also is a measure of how many cases are being decided. So you can see, are the judges being forced to work through more cases than another circuit.

Pending cases is, I think, doesn't make a lot of sense here unless you are trying to find the one statistic in which the D.C. Circuit isn't dead last compared to the other circuits. Not that its numbers are even unusually high in terms of pending cases. It is eighth out of the twelve circuits considered. But it doesn't say anything meaningful at all about the court's caseload. Pending cases are simply those that haven't yet been terminated by the court and are making their way through the process. So we would expect a fair amount of cases simply because not every case is going to be decided within 1 year, and a court could have a large number because of true backlog reasons. If the court was short-staffed and couldn't schedule hearings, we might see that pending cases would say something about backlog.

But, in fact, in this case, the D.C. Circuit is actually canceling hearings regularly. I will say it again: they are actually canceling hearings for lack of cases to be heard in oral argument. Thus, this number is clearly not pointing to the fact that the court is overburdened in getting to these cases. There are a lot of other reasons that I think explain the pending cases number better in this case, including the fact that it may just take a long time for parties to get their motions going back and forth. Cases can disappear for a long period of time because of dispute resolution. Cases can also just be failure to prosecute and the court never finds out, and after a certain number of years they just take them off the docket.

So I think in this case, it is clear that the pending cases statistic is not very meaningful and doesn't illustrate a lot about what is going on in the D.C. Circuit.

Mr. GOODLATTE. Thank you, and I will direct this question to you as well. Ms. Aron made much of former Chief Judge Wald's representation of the complex, time-consuming, labyrinthine disputes over regulations that she said characterized the court's docket. You acknowledged that the court has "more than its fair share of com-

plicated regulatory issues," but concluded "that hardly makes up for the heavily skewed absolute number of cases."

Can you elaborate on the evidence that your opinion is based on?

Ms. SEVERINO. Having worked there, I certainly see that these cases do take a longer period of time. Administrative appeals run a broad range of types of issues. They can include simple things like Board of Immigration appeals, up to complex regulatory matters.

But the simple fact is that while it may take a longer period of time than criminal cases, which are not as prevalent in the D.C. Circuit, they don't take three times or five times as long.

In addition, the case numbers used by the Administrative Office of the Courts to determine judicial emergencies do take into account the type of cases that are used. They are weighted numbers. And again, the D.C. Circuit is nowhere on that list, and I think that illustrates the judgment of the Administrative Office in terms of what numbers are relevant in terms of caseload.

Mr. GOODLATTE. Ms. Aron, do you think the standards laid out in the Senate Democrats' letter of 2006 regarding the appointment of additional judges to the D.C. Circuit were fair then? And regardless of whether you agreed with them at that time, how is it fair for the public to expect these same standards to not apply when the Democrats control the Senate and the White House?

Ms. ARON. Well, first of all, I think we have to start with what the Constitution actually says about judgeships, and it is important to note that President Obama is simply carrying out his constitutional task, an obligation of filling judgeships. That is set out in the Constitution. He is only carrying out his constitutional duty, and the Senate ought to confirm them as soon as possible.

With the situation——

Mr. GOODLATTE. So you don't agree with the Senate Democrats' letter of 2006.

Ms. ARON. Well, I should say that with respect to the nomination of Peter Keisler, it was an incredibly controversial nomination. For one thing, Peter Keisler had worked in the White House, and the White House——

Mr. GOODLATTE. Right, but they weren't making their argument based upon his qualifications or his potential position on any judicial decisions he might have to make. They were making their decision solely based upon the lack of need to fill the judgeship based upon the workload of the court.

Ms. ARON. Right. Well, that was a situation where we already had the ninth, tenth, and eleventh seats filled, and then John Roberts was nominated to the Supreme Court. It was only after several months that Peter Keisler's name came up, and interestingly and for the record, it is important to point out that the Republicans failed to move Peter Keisler's nomination forward. They never held a Committee vote on his nomination, and therefore never reported him out.

So, in essence, Republicans——

Mr. GOODLATTE. Maybe there was merit to that Senate Democrat standard that caused them to determine—and, in fact, as Senator Grassley noted, it was in the same timeframe that one seat was removed from the D.C. Circuit.

Ms. ARON. I think it is important to note now that Judges Silverman, Doug Ginsberg, the Chief Justice, John Roberts, Judge Timothy Tymkovich of the 10th Circuit, are all unanimous in saying that given and because the workload of the D.C. Circuit is so large, so important, so complicated, all of these seats need to be filled. No one, no one questioned that except senators——

Mr. GOODLATTE. Well, let me interrupt because my time has expired. But that would be even though the court has a smaller caseload today and more judges to handle the cases when you count both the active judges and the six senior judges, who are carrying a considerable workload on the court.

Ms. ARON. Well, I would just say to that point that President George W. Bush filled the ninth, tenth, and eleventh seats on the court when the caseload per active judge was lower than it is today. I would also point out that Senator Grassley and his colleagues recently confirmed a judge to the Eighth Circuit Court of Appeals, the Tenth Circuit Court of Appeals, with caseloads lower than the D.C. Circuit.

So, in effect, filling——

Mr. GOODLATTE. Let me ask you one more question here. In May, the New York Times quoted you as saying that the D.C. Circuit had "frustrated the President's agenda." It sounds as if you are suggesting that it is proper for judges to decide cases based on subjective factors such as political ideology or affinity to the person who nominated them rather than the rule of law, and can you possibly justify that view?

Ms. ARON. Well, those were my views and still continue to be. But the fact remains that presidents have an obligation to fill existing vacancies regardless of what my views are on the matter.

Mr. GOODLATTE. Even if it wastes taxpayers' money?

Ms. ARON. I don't view access to the courts as wasteful of taxpayers' money. In fact, I would view it as a priority.

Mr. GOODLATTE. Well, access to the courts certainly would be a priority, but if the court has been historically able to function with fewer judges, it is not up to the Congress, including the United States Senate with its advise and consent power, to needlessly fill positions on the court when those positions are not necessary to handle the caseload that has been handled in the past and is not superior to that right now.

My time has expired, and the Chair will recognize the gentleman from Georgia for 5 minutes for his questions.

Mr. JOHNSON. Thank you, Mr. Chairman.

I would first ask that a letter from Thomas Sussman, Director of Governmental Affairs for the American Bar Association, dated October the 29, 2013, addressed to yourself, I would ask that it be entered into the record.

Mr. GOODLATTE. Without objection, so ordered.

[The information referred to follows:]

Defending Liberty
Pursuing Justice

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October 29, 2013

The Honorable Robert W. Goodlatte, Chair
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte:

I am writing on behalf of the American Bar Association to express our views on the judgeship needs of the federal judiciary and request that this letter be made part of the record of today's hearing before your committee, titled, "Are judges always the answer?"

When federal courts do not have sufficient judges to keep up with the workload, civil trial dockets take a back seat to criminal dockets due to the Speedy Trial Act. As a result, persistent judge shortages increase the length of time that civil litigants and businesses wait for their day in court, create pressures that "robotize" justice, and increase case backlogs that will perpetuate delays for years to come. This has real consequences for the financial well-being of communities and businesses and the personal lives of litigants whose cases must be heard by the federal courts – examples include cases involving challenges to the constitutionality of a law, unfair business practices under federal antitrust laws, patent infringement, police brutality, employment discrimination, and bankruptcy.

The negative consequences of too few judges have been exacerbated by the across-the-board budget cuts mandated by sequestration this fiscal year. Staff layoffs and furloughs and reductions in services and operating hours implemented in courts across the country in response to sequestration have made it even more difficult for courts with too few judges to keep up with caseloads and deliver timely justice. The combination of too few judges and insufficient funding is diminishing the ability of our federal courts to serve the people and deliver timely justice.

The last comprehensive judgeship bill was enacted in 1990. In the intervening years, federal judicial caseloads have steadily and steeply increased, fueled in large part by congressional expansion of federal court jurisdiction and national drug and immigration policies that call for and fund enhanced law enforcement efforts. Despite this growth, Congress has authorized only 34 additional district court judgeships -- in 1999, 2000, and 2002 -- while allowing a half-dozen temporary judgeships in other districts to expire. Consequently, over the past 23 years, district courts have experienced a 39 percent increase in filings, but only a 4 percent increase in judgeships. Even more sobering, the

number of appellate court judges has not changed, despite a 34 percent increase in filings since 1991.

The Judicial Conference of the United States conducts a survey of the judgeship needs of the U.S. courts every two years during which it considers requests for additional authorized judgeships as well as requests for not filling existing vacancies. Policies were adopted by the Judicial Conference in 1997 and 1998 establishing procedures for recommending that vacancies not be filled on district courts and courts of appeals, respectively. All Judicial Conference recommendations with regard to judgeship needs originate from requests made by individual courts. If a particular court does not make a judgeship request, the Judicial Conference does not initiate an inquiry.

The Judicial Conference's review process starts with an examination of weighted or adjusted case filings of that court, after which many additional factors are taken into consideration. Judgeship recommendations are developed using a multi-step process of evaluation that takes into account the experience-based views of judges affected by the workloads, types of cases that come before the court, magistrate judge assistance, status of senior judges, geographical factors, cause of caseload growth and availability of alternative methods to handle it, administrative practices, and a host of other factors. Consideration of these additional factors diminishes the overall importance of the weighted or adjusted case filings and explains why judgeships are not requested in every jurisdiction or circuit with abnormally high caseloads.

This past July, Senator Coons (D-DE) introduced S. 1385, a comprehensive judgeship bill that is based on the Judicial Conference's latest detailed assessment of the resource needs of the judiciary. The bill calls for the addition of 5 permanent judgeships and one temporary judgeship for the courts of appeals and 65 permanent judgeships and 20 temporary judgeships for the district courts. It also calls for the conversion of 8 existing temporary district court judgeships to permanent status.

The district courts in which the Judicial Conference is recommending additional judgeships currently are laboring under weighted case filings of almost 630 per authorized judgeship, far above the 430 weighted caseload threshold that the Judicial Conference uses as a starting point for examining a district court's need for additional judgeships. If Congress created all of the judgeships requested, the weighted caseload of all authorized district court judgeships would still be in excess of 430 cases.

In some jurisdictions, caseloads are dramatically worse: judges of the District of Arizona and the Western District of Texas have caseloads that exceed 700 weighted filings, and judges in three districts – the Eastern District of California, the Eastern District of Texas, and the District of Delaware – labor to dispense timely justice with weighted caseloads of over 1,000 per judge. The litigants before these courts deserve better.

The need for more judgeships is just as evident in our courts of appeals, where the number of appeals filed annually has grown from approximately 41,000 in 1990 to close to 56,500 in March 2013.The Judicial Conference has limited its request to four

permanent judgeships for the Ninth Circuit Court of Appeals and one permanent judgeship for the Sixth Circuit Court of Appeals.

We are aware that some Members of Congress question the method by which weighted and adjusted case filings are determined and caseload minimums for considering the need for additional judgeships are set by the Judicial Conference. A review of documents dating back to 2003 reveals that the concerns of the Government Accountability Office (GAO) with regard to the validity of the methodology used to determine case weights have been a major factor of contention that likely has contributed to the failure to enact a comprehensive judgeship bill since 1990. We urge collaboration among Congress, the Judicial Conference, and the GAO to resolve this impasse so that the substantive needs of the U.S. courts can be met without further delay.

Just as Congress has an obligation to oversee the courts, it likewise has an obligation to provide the judiciary with the resources it needs to carry out its constitutional and statutory duties. There are several steps, short of enactment of S. 1385, that Congress could take to help the judiciary maintain its excellence and serve the people in a timely and just manner:

1. Congress should quickly move to establish new judgeships in the five district courts singled out by the Judicial Conference for immediate relief -- the District of Arizona, the Eastern District of California, the District of Delaware, the Eastern District of Texas, and the Western District of Texas. The astronomically high caseloads under which they struggle are indisputable – and indefensible. Both the House and Senate Financial Services and General Government Appropriations Committees acknowledged the severity of the conditions by including a provision in their FY 2014 appropriations bills to authorize new judgeships in these districts.

2. Congress should convert the eight temporary judgeships into permanent judgeships or at least extend their temporary status for ten years or more. To reiterate the Judicial Conference's concern, without reauthorization, all eight will lapse next year, further diminishing scarce judicial resources in these districts, and both the Senate and House Financial Services and General Services Appropriation bills contain provisions extending these judgeships.

3. Congress should consider the impact of legislation on the workload of the federal courts. Congress should take steps to assure that the judiciary has sufficient resources to handle new responsibilities resulting from enactment of legislation, such as immigration reform, that expands federal court jurisdiction or is expected to substantially increase the workload of the federal courts.

4. When making budgeting decisions, Congress should take into consideration that the federal judiciary is essential to preserving constitutional democracy and freedom, and that waiting to restore funds until the erosion in the quality of justice

becomes a *fait accompli* is not a viable national option. The ABA urges Congress to protect the federal judiciary from future deficit reduction and to increase funding for FY 2014 to an amount equal to or greater than the amount approved by the House Appropriations Committee this past summer.

Thank you for the opportunity to express the views of the ABA on issues so central to our mission.

Sincerely,

Thomas M. Susman

cc. Members of the Subcommittee

Mr. JOHNSON. Thank you.

Mr. GOODLATTE. And while we are doing that, I will also seek unanimous consent to put in the record Senator Arlen Specter, at the time chairman of the Senate—I'm sorry. It is a letter signed by Senators Patrick Leahy, Chuck Schumer, to Senator Arlen Specter, at that time Chairman of the Senate Judiciary Committee, dated July 27, 2006, setting forth the so-called Senate Democrats' letter standards.

Without objection, it will be made a part of the record.

[The information referred to follows:]

United States Senate
WASHINGTON, DC 20510

July 27, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Specter:

We write to request that you postpone next week's proposed confirmation hearing for Peter Keisler, only recently nominated to the D.C. Circuit Court of Appeals. For the reasons set forth below, we believe that Mr. Keisler should under no circumstances be considered – much less confirmed – by this Committee before we first address the very need for that judgeship, receive and review necessary information about the nominee, and deal with the genuine judicial emergencies identified by the Judicial Conference.

First, the Committee should, before turning to the nomination itself, hold a hearing on the necessity of filling the 11th seat on the D.C. Circuit, to which Mr. Keisler has been nominated. There has long been concern – much of it expressed by Republican Members – that the D.C. Circuit's workload does not warrant more than 10 active judges. As you may recall, in years past, a number of Senators, including several who still sit on this Committee, have vehemently opposed the filling of the 11th and 12th seats on that court:

- Senator Sessions: "[The eleventh] judgeship, more than any other judgeship in America, is not needed." (1997)
- Senator Grassley: "I can confidently conclude that the D.C. Circuit does not need 12 judges or even 11 judges." (1997)
- Senator Kyl: "If . . . another vacancy occurs, thereby opening up the 11th seat again, I plan to vote against filling the seat -- and, of course, the 12th seat – unless there is a significant increase in the caseload or some other extraordinary circumstance." (1997)
- More recently, at a hearing on the D.C. Circuit, Senator Sessions, citing the Chief Judge of the D.C. Circuit, reaffirmed his view that there was no need to fill the 11th seat: "I thought ten was too many. . . I will oppose going above ten unless the caseload is up." (2002)
- In addition, these and other Senators expressed great reluctance to spend the estimated $1 million per year in taxpayer funds to finance a judgeship that could not be justified based on the workload. Indeed, Senator Sessions even suggested that filling the 11th seat would be "an unjust burden on the taxpayers of America."

Since these emphatic objections were raised in 1997, by every relevant benchmark, the caseload for that circuit has only dropped further. According to the

Administrative Office of the United States Courts, the Circuit's caseload, as measured by written decisions per active judge, has declined ***17 percent*** since 1997; as measured by number of appeals resolved on the merits per active judge, it declined by ***21 percent***; and as measured by total number of appeals filed, it declined by ***10 percent***. Accordingly, before we rush to consider Mr. Keisler's nomination, we should look closely – as we did in 2002 -- at whether there is even a need for this seat to be filled and at what expense to the taxpayer.

Second, given how quickly the Keisler hearing was scheduled (he was nominated only 28 days ago), the American Bar Association has not yet even completed its evaluation of this nominee. We should not be scheduling hearings for nominees before the Committee has received their ABA ratings. Moreover, in connection with the most recent judicial nominees who, like Mr. Keisler, served in past administrations, Senators appropriately sought and received publicly available documents relevant to their government service. Everyone, we believe, benefited from the review of that material, which assisted Senators in fulfilling their responsibilities of advice and consent. Similarly, the Committee should have the benefit of publicly available information relevant to Mr. Keisler's tenure in the Reagan Administration, some of which may take some time to procure from, among other places, the Reagan Library. As Senator Frist said in an interview on Tuesday, "[T]the DC Circuit. . . after the Supreme Court is the next court in terms of hierarchy, in terms of responsibility, interpretation, and in terms of prioritization." We should therefore perform our due diligence before awarding a lifetime appointment to this uniquely important court.

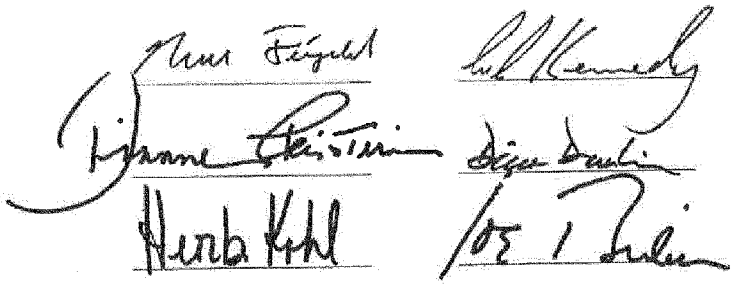
Finally, given the questionable need to fill the 11th seat, we believe that Mr. Keisler should not jump ahead of those who have been nominated for vacant seats identified as judicial emergencies by the non-partisan Judicial Conference. Indeed, every other Circuit Court nominee awaiting a hearing in the Committee, save one, has been selected for a vacancy that has been deemed a "judicial emergency." We should turn to those nominees first; emergency vacancies should clearly take priority over a possibly superfluous one.

Given the singular importance of the D.C. Circuit, we should not proceed hastily and without full information. Only after we reassess the need to fill this seat, perform reasonable due diligence on the nominee, and tend to actual judicial emergencies, should we hold a hearing on Mr. Keisler's nomination.

We thank you for your consideration of this unanimous request of Democratic Senators.

Sincerely,

Patrick Leahy Chuck Schumer



Mr. GOODLATTE. The gentleman is recognized.

Mr. JOHNSON. Thank you, Mr. Chairman.

I want to point out before I begin that the entire budget of the Federal judiciary makes up less than 1 percent of our entire Federal budget. It is not driving budget deficits and debt, and we know that this is not, this failure to adequately staff our judiciary is not about saving taxpayer dollars. It is really about forming a judiciary that has certain ideological views, and it is my friends on the other side of the aisle that seem to have that aspiration and have been working on that for some time.

There is a serious need to fill judicial vacancies on the Federal bench throughout this country. District court vacancy rates are at historically high and unsustainable levels. The number of vacancies that qualify as judicial emergencies due to their high volume of case filings, the length of the vacancy or, if it is a court with only one judgeship, is without precedent. According to one of our witnesses today, according to the Alliance for Justice, over 10 percent of all judges—excuse me—over 10 percent of all judgeships in Federal trial and appellate courts are unfilled.

The Brennan Center for Justice at New York University School of Law likewise reports that these have been recently higher than at any point since 2002. These vacancies are hurting districts with the greatest need because district court workloads are at record highs. But due in large part to the Republican obstructionism, nominees to the Federal bench face record wait times from nomination to current confirmation in the Senate as compared to other recent Administrations.

Senate Republicans have blocked a historic number of district court nominees during this particular presidency. In my own state of Georgia, the Northern District, there are three district court vacancies and two Eleventh Circuit Court vacancies, both Georgia positions. Because we have two Republican senators in Georgia, I think it is no surprise that we have had these vacancies that have been unfilled for years now. A couple of those district court appointments are judicial emergencies, and still, instead of giving deference to the President to nominate candidates of his choosing, we have bargaining going on by our senators trying to install their picks in exchange for allowing the President to get one pick confirmed.

So it is almost like it is a game. And who is suffering? It is the American people who have business before the court.

Justice delayed is justice denied, and it is really incredible to me to think that we would look at our third co-equal branch of government as a step-child and keep it from doing what is fundamental in our Constitution, in our preamble to the Constitution, to establish justice. I mean, that is the first thing that is mentioned, and we are treating our judiciary as if it were a step-child and something that we can just lord over. It is wrong.

Is there any other explanation for the failure to confirm judges for the Federal bench throughout the nation other than what I have stated today? Does anyone want to answer that question? Is there any other reason?

Ms. SEVERINO. Congressman, I think there is that clear additional reason, one that is identified by Russ Wheeler of the Brook-

ings Institution, no conservative apologist, and that is the President's failure to move quickly to make nominations to these seats. He identified that——

Mr. JOHNSON. All right. Well, let me stop you right there. Ms. Aron, you apparently have some——

Ms. ARON. I would differ from the other witness. In fact, 90 percent of the vacancies today are due to the fact that Republican senators, either two senators in some states or one senator in other states, are blocking the progress of candidates. The delay is due almost entirely to Republican senators, and I am pleased to say that the President has actually picked up the rate of nominations and now has out-paced President Bush, and I think President Clinton in terms of number of nominations.

So it is not the number of nominations. It is the fact that they cannot get through the states, and once they are on the floor, they are blocked by Republican senators.

Mr. JOHNSON. Thank you. I yield back.

Mr. FRANKS [presiding]. The Chair now recognizes Mr. Coble for 5 minutes.

Mr. COBLE. Thank you, Mr. Chairman. I appreciate that.

I want to revisit the New York Times quote. Ms. Aron, it sounds to me as if you were suggesting that it is proper for judges to decide cases based upon subjective factors such as political ideology or affinity to the person who nominated them rather than the rule of law. I find that irregular.

Ms. Severino, can you illuminate in this irregular darkness in which I sit, responding to Ms. Aron's response?

Ms. SEVERINO. I'm sorry. Could you repeat the question?

Mr. COBLE. I said it appeared to me from the New York Times quote that Ms. Aron was more concerned about ideology and loyalty to the person doing the nominating than the rule of law. This comes down irregular to me. Now, what am I missing?

Ms. SEVERINO. Unfortunately, I have to agree with you. I think her quote saying that we need to restore balance to the court by filling empty seats and pointing to the fact that the majority has made decisions frustrating the President's agenda I think clarifies the reason that these seats are being filled right now. All the discussion of judicial emergencies is obviously not what is going on in the D.C. Circuit here. I absolutely agree that judicial emergencies should be filled. But given the fact that there is no such emergency in the D.C. Circuit and that Ms. Aron has pointed to the President's agenda as a reason to fill the seats, I think it is clear that that is what is going on, not a real concern for filling the seats in that circuit. Let's fill the judicial emergencies first.

Mr. COBLE. Well, the circuit has the lowest workload in the nation. Am I correct?

Ms. SEVERINO. That is correct, whether you look at appeals filed, appeals disposed of, appeals disposed of on the merits, virtually any statistic.

Mr. COBLE. Mr. Chairman, and I say to the witnesses, and the panel, this seems to me to be an ideal case of where prudence should prevail. Savings could be realized and no one would be penalized. Am I missing the mark? Hopefully not. I miss the mark from time to time.

Ms. SEVERINO. Even if it is a small percentage of the Federal budget, it seems like a good use of taxpayer money to be prudent and not over-spend where we don't need it.

Mr. COBLE. As Senator Grassley indicated, if we got more judges, there wouldn't be enough work for them to go around. He explained that one of the sitting judges stated that.

Ambassador—by the way, it is good to have North Carolina exposure here, you and Ms. Severino. You didn't make the cut on that, Ms. Aron, or did you? Did you have Carolina connections?

Ms. ARON. No.

Mr. COBLE. We will forgive you.

Ms. ARON. A New Yorker.

Mr. COBLE. We will hold you harmless for that.

Ms. ARON. Through and through.

Mr. COBLE. We will hold you harmless for that.

I was going to ask the Ambassador one question, Mr. Chairman, if I can find it.

Ambassador, I noticed that you relied heavily on quotes from now-Senior Judge Harry Edwards. What makes his perspective so persuasive to you?

Ambassador GRAY. For two reasons. First, he did, as I indicated in my testimony, rescue the D.C. Circuit from really a fractious period, and launched it on what has been a two- or three-decade-long period of stability and predictability, and this is something which every judge finds to be an incredibly important component of his or her work there, to provide predictability for the regulated community in this country. That is why I quote him so extensively, because he has thought about it and seen it and overseen the shift from, as Frankfurter called it, "the collectivity of fighting cats" to one of, if not the most, collegial court in the country. It also happens to be that he was a Democratic nominee, so this is not a partisan pitch on my behalf.

Mr. COBLE. Well, I thank you both, all three of you, for being here.

Ms. Aron, I didn't give you a chance to respond to the New York Times. I assume that you were correctly quoted.

Ms. ARON. I was correctly quoted, and I stand by the quote. But I think that certainly the D.C. Circuit has, in a number of instances, gone out of its way to invalidate many of the President's critically important initiatives, and that is a result of Republican court-packing of the D.C. Circuit.

But put that aside because we are not talking about court packing and ideology at this hearing. As I understand it, this is a hearing on filling vacancies on the court, and ideology—there is nothing in the Constitution regarding ideology and filling vacancies. Put simply, this President has an obligation, an obligation that has been honored and revered over time by every other president, and he is simply carrying out his constitutional duty to fill existing vacancies.

In fact, if you look at the three candidates who have been put forth for the D.C. Circuit, you will find three supremely qualified candidates. I would never expect that any of them would upset the current collegial climate on the court. In fact, all three are well known. One is currently a district court judge who was unani-

mously confirmed to the district court just a few years ago. So I hardly think——

Mr. COBLE. My time has run out, so if you will wrap up.

Ms. ARON. Okay. I think I am done.

Mr. COBLE. I assume that you don't agree with my irregular stand from your response, and we can respectfully disagree on that. The people to whom you referred—and I will be through in just a minute, Mr. Chairman—may well be qualified, but they are not needed. The tasks are being performed without their presence there.

So with that, I will yield back, Mr. Chairman.

Mr. FRANKS. I thank the gentleman.

The Chair will now recognize himself for 5 minutes for questions.

Ambassador Gray, if it is all right, I will begin with you. It appears some of our friends on the left have concluded that the court is irretrievably biased against their perspective and that the only remedy, even though the court seems to be evenly split, as it appears, but their only remedy is to stack the deck against those who challenge the expansion of the administrative state.

What evidence do you have that they have misdiagnosed the problem and are overreaching in their attempts to reverse outcomes with which they disagree?

Ambassador GRAY. I don't see any evidence of bias in favor or against the current Administration. What the data show very clearly are that the reversal rates work the other way. That is to say the current Administration has been reversed less than the predecessor Administration of George Bush, and I would take just a minute, if I may, to use as an example one of the cases that Senator Schumer complained about when he said we are going to fill up the D.C. Circuit one way or the other.

He was talking about—this is a technical case. Some of you may be familiar with it, the cross-state pollution rule which the D.C. Circuit rejected. Now, the interesting thing about that is that is the follow-on case to an earlier rule, the same rule basically, that the D.C. Circuit threw out after it had been issued by President Bush.

So the origin of this case that Senator Schumer is complaining about is an anti-Bush case, not an anti-Obama case. I can't really think of an example that more disproves Senator Schumer's case better than that one instance.

Mr. FRANKS. Thank you, sir.

Ms. Aron, I would like to follow up with Ambassador Gray's comments. He cited Federal court statistics that show that the court reversed administrative agencies in only 16.7 percent of the cases it decided during the 2009-2012 reporting period, and that compares with 18.8 percent of the time during the Bush years. It sounds as if the numbers don't back up the assertions that the judges on the court, including the "Republican-appointed majority," are biased against the Administration.

Besides anecdotes, what is your evidence to the contrary?

Ms. ARON. Well, I think what we ought to consider and what has been considered by the Judicial Conference of the United States, led by Chief Justice John Roberts, is pending cases per active judge, not filings, not completions. It is interesting. In 2012, the D.C. Circuit was only operating with seven out of twelve judges.

How could you look at completions when the number of judges was down?

I would say anybody that has looked at this issue, Republican and Democrat alike, has concluded that pending cases per active judge is the standard. And again, as I have said, President George W. Bush, when he filled the ninth, tenth, and eleventh seats, the active caseload per judge was lower than it is today. This is not an issue of caseloads.

Mr. FRANKS. Let me—sorry about that. Let me go ahead and speak to that and ask you about this. Ms. Severino noted that the court has had to cancel sittings in recent years due to the lack of cases scheduled for oral argument. Indeed, in 1985, the court adopted a case management plan that required judges to sit in 4-day sessions and hear oral arguments in 112 cases per year.

For years now they have sat in 3-day sessions only and had been scheduled to hear oral arguments in 72 cases a year.

So how does that square with these facts—these facts, how do they square with the claims on your part that the court's workload has significantly increased in recent years? And also, how do you reconcile this reduction in workload with your support for 138 percent increase in active judges?

Ms. ARON. Well, I cannot base my answer on anecdotal information.

Mr. FRANKS. Well, these are not anecdotal. This is not anecdotal information at all, Ms. Aron.

Ms. ARON. I can only base it on active pending caseload.

Mr. FRANKS. These are the statistics. This is not anecdotal. I am asking you, other than anecdotal information, what information do you have, what evidence do you have that the court has somehow become more activist against this president than the previous president? What evidence do you have that their workload has increased that would require 138 percent increase in judges?

Ms. ARON. Okay. So, those are two separate questions.

Mr. FRANKS. They are.

Ms. ARON. All right.

Mr. FRANKS. You have made assertions in both areas. If you would just give me evidence in either one of them, I would be happy.

Ms. ARON. Okay. Well, let's deal with the ideological part first.

Mr. FRANKS. All right.

Ms. ARON. And then we can deal—I think I just responded—with the caseload.

If you look at the results in cases coming out of the D.C. Circuit, whether it is environmental protections, the D.C. Circuit struck down an EPA rule that was intended to control air pollution across state lines. That rule, had it gone into effect, would have prevented from 13,000 to 24,000 premature deaths.

Worker rights. This court of appeals invalidated three of President Obama's nominees to the National Labor Relations Act.

This court invalidated an FDA cigarette warning label a few years ago.

This court struck down a regulation that was promulgated pursuant to Dodd-Frank that would have made it easier for share-

holders to propose their own nominees to corporate boards of directors.

Mr. FRANKS. Thank you, Ms. Aron.

Ms. ARON. But again, as I have said, as I have said, my views and what this court has done has relatively little relevance to the issue about which we are here today, which is filling existing vacancies, and our position is that it is critically important. In fact, it is the constitutional task for the President and the Senate to confirm judges to the D.C. Circuit.

Mr. FRANKS. Thank you, Ms. Aron.

And I will now recognize Mr. Bachus for 5 minutes.

Mr. BACHUS. Thank you.

I think in 2006—and I don't know if you have a copy, Ms. Aron, of a letter that Senator Joe Biden and Patrick Leahy and Chuck Schumer and Ted Kennedy and four other Democratic, or five other Democratic senators sent to then-chairman of the Judiciary Committee, Arlen Specter. They urged them to tend to actual judicial emergencies before moving forward with nominees to the D.C. Circuit.

Do you think they were right to do that?

Ms. ARON. Well, I am reading this letter, and I would say that the——

Mr. BACHUS. Look at the next-to-the-last paragraph, "we should turn to nominees first and emergency vacancies should clearly take priority over a possibly superficial one, and that is the need to fill an eleventh seat on the D.C. Circuit."

Ms. ARON. I am looking at the paragraph before that, and I have——

Mr. BACHUS. But tell me about that one, and then we will go to the one before that.

Ms. ARON. Well, I certainly can see the reason that Senators Schumer, Leahy and others wanted to——

Mr. BACHUS. Joe Biden, Vice President Joe Biden.

Ms. ARON [continuing]. Wanted to maintain some process.

Mr. BACHUS. No, I am not talking about that paragraph.

Ms. ARON. It looks to me like what was happening at that point, in 2006, is that——

Mr. BACHUS. Well, they said their caseload wasn't sufficient. But look at that next-to-the-last paragraph. Would you do that? I don't know if you can read that, but they said that emergency vacancies should clearly take priority over what they described as superficial——

Ms. ARON. Sir, I think that last paragraph has to be read in context, not alone. And it looks to me——

Mr. BACHUS. They were asking him not to appoint someone to the D.C. Circuit because——

Ms. ARON. No. What they were doing in this letter, as I read this letter, is they were saying do not rush this nomination through before—and there is a very important point made in this letter—before the American Bar Association has an opportunity to evaluate this nominee. They shouldn't rush this nominee through.

Mr. BACHUS. But they also said emergency—they clearly said emergency appointments should be made first.

Ms. ARON. Well, I see that. But I am just saying there is a larger context here. The information wasn't in on Mr. Keisler. No one could really vote, and we wouldn't want to vote on nominees to the Circuit Court before we know what their records are. That is what this letter is saying.

Mr. BACHUS. No, it is not. The next-to-the-last paragraph says they ought to give priority to the emergency vacancies. That is exactly—I am going to read it. "Emergency vacancies should clearly take priority, and we have 34 of those." That is what it says.

Let me ask you this. When school children come up here, we talk to them about the Constitution. We show them the three branches of government. We talk about checks and balances. Do you think that a consideration for who sits on a circuit court or an appeals court ought to be whether they rule in favor of the executive branch? Do you think that ought to be even part of the equation?

Ms. ARON. No. I think we should select nominees based on qualifications of intellect, analytical skills, judicial temperament, honesty.

Mr. BACHUS. But you said in the New York Times, you talked about they keep ruling against the Administration, you need to appoint someone that will——

Ms. ARON. Well, it is my belief that we must—and I think the Administration has done an exemplary job of selecting——

Mr. BACHUS. Listen, I realize that you totally support this Administration. I mean, for the record, I totally acknowledge that.

What about Mr. Gray's testimony and the numbers? Is there anything wrong with these numbers, that this court turned down almost 19 percent, 18.8 percent of the Bush—reversed the Bush Administration administrative agency rules, and only 16.7 percent during the Obama Administration? So this court has not been more adverse, or is there something wrong with those numbers?

Ms. ARON. I don't believe there is something wrong with those numbers. I just don't think those are the relevant numbers to consider at this hearing, and they certainly aren't the numbers that have been considered by the Judicial Conference.

Mr. BACHUS. What about the fact that the court has gone from 4 days a week to 3 days a week in their sessions, and they have had to cancel hearings? Were you aware of that?

Ms. ARON. I do not actually believe, one, that that is accurate; and two, I think——

Mr. BACHUS. Ms. Severino, it was your testimony that they had gone from 4-day sessions and heard oral arguments on 112 cases, and for years now they have had 3-day sessions only and been scheduled to hear oral arguments in 72 cases a year. Is that correct? She said she didn't believe it.

Ms. SEVERINO. As far as I am aware, that is correct. I believe that was something Mr. Franks was quoting from a different source. It was from the Administrative Office or the Clerk of the Court.

Mr. FRANKS. We also have statistics here that show that in 2006, the average per-judge cases was 90. That is when the letter was written. And today it is 81. So there is a marked decrease rather than an increase.

Mr. BACHUS. But, I mean, she said that she didn't think those figures were accurate. Was your testimony inaccurate?

Ms. SEVERINO. I think the statistics are quite clear on all of these issues. It is just a matter of whether you want to pick and choose them to find the one statistic that shows—for example, she has picked the pending cases and said at the time of these earlier nominations the court was less busy than it is now. But actually, if you look at any other statistic you will see that despite the decrease in number of active judges, from 10 judges to 8 judges, now we have almost equivalent striking the way the court creates law has remained the same, and in some cases gone down. It depends on what statistic you look at, cases filed per active judge, cases disposed of per active judge, cases disposed of on the merits, cases disposed of after oral argument, cases scheduled for oral argument per judge. All of these show either the cases have remained almost identical or have actually gone down in several of these.

So you can point to this one, pending cases, but I think there are a lot of good reasons that the other issues make more sense. Those are the statistics I would rely on.

Mr. BACHUS. Ms. Aron, in the New York Times you made the point pretty vocally that this court has frustrated the President's agenda. But if they believe that those rulings violate the law, isn't their job to be a check on the executive branch?

Ms. ARON. Absolutely, absolutely.

Mr. BACHUS. Thank you.

Mr. FRANKS. I thank the gentleman.

And I would now recognize Mr. Holding for 5 minutes.

Mr. HOLDING. Thank you, Mr. Chairman.

Ms. Severino, I have read with interest the Virginia Law Review article regarding the D.C. Circuit written by John Roberts, and several advocates for packing more judges into the D.C. Circuit have cited this lecture or article written by the Chief Justice in their support of their effort.

What do you think is a fair reading of the article, and what is the main take-away from it?

Ms. SEVERINO. I think it is actually ironic that they cite this article because, if anything, the main take-away point is—it is really a historical piece, first of all. It is not talking about the caseload of the courts. But his main take-away point is the unique role of the D.C. Circuit in reviewing decisions of the national government, and he actually points to the reason that that makes it particularly vulnerable.

He relates a story from the 19th century, from President Lincoln actually, who eliminated the court entirely because he wasn't happy with its rulings. And while we are not hearing calls today to have the court completely eliminated, we are hearing a very similar type of argument pointing, as Ms. Aron did, to the results of the cases, not actually to the legal standing. Maybe someone who is a fan of a particular EPA regulation would like to see it upheld, but that is not the court's question that they are considering.

They need to consider is this regulation within the authority of the statute. Similarly with the NLRB appointments. It is not would we like more commissioners on the NLRB, are we pro or against

workers' rights. That wasn't any issue in the case. The case was how is the recess appointments power to be interpreted.

These are the issues that the judges should be looking at. They shouldn't be—Republican or Democrat nominees should not be looking at whether it is a policy result they should want. They should be looking simply to keep the court within its constitutional and legal boundaries. That is their unique role, as the Chief Justice pointed out in this article, and it does make them vulnerable to political attacks, but I am hoping that the D.C. Circuit will be able to maintain its role because we certainly need that check to maintain our checks and balances.

Mr. HOLDING. Well, it is a fascinating article.

I want to turn away from the D.C. Circuit for a moment. My frame of reference is the Eastern District of North Carolina, where I used to practice, which has been ranked as the number-one most efficient district court in the nation. It dispenses with more cases in a more efficient manner than any other court, and I think it far out-ranks number two.

One of the ways that the chief judge in the Eastern District has been able to clear backlogs and keep up with a robust docket is having visiting judges come in from around the nation, either senior judges or judges from other districts that have a very light caseload.

I wonder if there has ever been a study done that looked across all districts and saw where there was excess judicial capacity in other districts and said that, well, we can apply that excess judicial capacity to districts that are over-worked or have higher caseloads, if there has ever been a concerted effort to do that, to any of you all's knowledge.

Ambassador Gray?

Ambassador GRAY. I am not aware of any study that has been comprehensive about this, but the practice of inviting in judges to alleviate shortages is not unheard of. I mean, it does happen, and senior judges do move around where they are most needed, including Supreme Court retirees.

Ms. ARON. I would just say I think the Judicial Conference takes into account numbers of judges and pending cases being argued. I just want to mention, though, that the Eastern District of North Carolina has the longest standing district court vacancy in the country.

Mr. HOLDING. And I would point out that being the most efficient district in the country may indicate that they have enough judges.

But, Ms. Severino, you were going to add a comment.

Ms. SEVERINO. Certainly. The Administrative Office of the Courts actually does keep statistics on this, and it actually lines up in some ways with the workloads of the circuits. You will see the Eleventh Circuit has—I don't have the numbers right in front of me, but it has a very large number of visiting judges that come in. That is clearly the busiest circuit right now by almost any statistic that you look at, sometimes five times more busy than the D.C. Circuit.

The D.C. Circuit, however, at least in the past year, and I am not aware of any time in recent history that it has had any visiting judges, simply again because there is not the need for it at all.

There is barely enough work to go around, as the judges have mentioned. So that is another good indicator of the need for judges on a court.

Mr. HOLDING. Thank you.

Mr. Chairman, I yield back.

Mr. GOWDY [presiding]. I thank the gentleman, the former United States Attorney from North Carolina.

The Chair would now recognize a former United States Attorney, Mr. Marino.

Mr. MARINO. Thank you, Chairman, and I apologize. I had some people that were waiting in the hall, and I didn't want them standing out there that long. I am sure they have other important things to do.

Ms. Aron, I have some questions, and I hear you making your argument based on the Constitution. Am I correct in that? You are looking at this from a constitutional point of view.

Ms. ARON. The Constitution, and I would say standard operating procedures. This is what every president does, is fill vacancies.

Mr. MARINO. Okay, but there has still been a lot of standard operating procedures here in D.C. that have taken place over the last 50 years in both parties that have put us $17 trillion in debt. I clerked for a Federal judge, I was a prosecutor for 18 years, and I worked in a factory until I was 30 years old, and I know what it is like to stretch a paycheck from week to week and how my wife stretches a buck still today, particularly with kids in college and the whole nine yards.

Let's set the constitutional argument aside for a moment. I think the President has a responsibility, every president. And, by the way, every president for the last, I think it is the last 40, maybe even 50 years, they have contributed to the debt. Every single president has added to the debt. It is just getting in bigger numbers over the last 50 years. So enough blame to go around.

But I think the President has a responsibility to the taxpayers as well. He or in the future she is the CEO and has to watch the bottom line.

Now, there was a statement made, and I do agree with this because I read it somewhere before, that judges annually cost about $1 million with salaries, benefits, their staff, the whole nine yards. So did I miss or did you not bring up in your opening statement when you were talking about so many cases per judge? I didn't hear you bringing up senior judges. So correct me if I am wrong. You based that division of cases on what we refer to as sitting or full-time judges, correct?

Ms. ARON. Correct.

Mr. MARINO. Okay. Now, where I came from, the Middle District of Pennsylvania, we have six sitting judges or "full-time" judges, but we also have seven senior judges that are still costing the taxpayers $1 million a year, okay? So I think it was—I think you should have not left out that those senior judges, at least what I am familiar with in the Middle District of Pennsylvania, are carrying near or full caseloads. And I know, because I have tried cases as a U.S. Attorney myself in front of not only the sitting judges but the senior judges.

So there is some misconception there. I think it is skewed, and if you are going to divide the cases, you need to divide them with the sitting full-time judges and the retired judges.

Just so the public knows, first of all, the circuit courts don't hear trials. They hear appellate cases. They hear when someone doesn't like the decision, whether it is the plaintiff or it is the defendant, or whether it is the government, they hear legal arguments as to whether a person should get a new trial or a new sentencing. So that is very different from hearing trials, hearing cases, going to trial, taking guilty pleas, sentencing, the whole nine yards. District courts are very busy.

So if there is anywhere, if there is anywhere that we should be looking to increase Federal judges, it should be in the district court area because of the numbers of cases. When I was a U.S. Attorney, and I still communicate with my colleagues, the same number of judges are there, six sitting full-time and seven seniors. When one of those seniors dies, that increases the caseload. Thank goodness, at least in the Middle District of Pennsylvania, we have seven great senior judges that are there.

So that is a misconception, and I am disappointed that you didn't factor that in.

Ms. ARON. May I respond?

Mr. MARINO. Please.

Ms. ARON. Okay. First of all, we are looking at active Federal judges. You know from your time as a clerk and U.S. Attorney that a senior judge can leave the bench at any time he or she wants. They don't serve——

Mr. MARINO. Okay. Let me——

Ms. ARON. They are not there for life.

Mr. MARINO. Let me stop you right there, though. But they don't. They don't.

Ms. ARON. But they can.

Mr. MARINO. But they are still there. They are still there collecting full pay and full benefits.

Ms. ARON. But they can opt out of the very complex regulatory cases if they——

Mr. MARINO. They can. Okay. Why don't we wait until that point? Why don't we wait until that point when they opt out and say I don't want to do this any longer, and then assess the situation?

Ms. ARON. Okay, here is the answer why.

Mr. MARINO. Okay.

Ms. ARON. Because just like the Administration, the Judicial Conference has to plan, has to take into account what the caseload will likely be in the future, and in taking into account caseloads and in planning ahead, it is very difficult, almost impossible, to know what a senior judge is going to do or not do.

Mr. GOWDY. The gentleman's time has expired. I am going to let the gentleman get an answer to his final question. I would just note for Judge Poe and Mr. Collins, votes are probably going to be called in the next 15 or 20 minutes.

Mr. MARINO. You brought up just a moment ago what if you can't make any statements based on what may happen. Well, the case-

loads have actually gone down with the same number of judges, and I think the figures that you were citing are very misleading.

And with that, I yield back.

Mr. GOWDY. I thank the gentleman.

The Chair would now recognize a former state court judge from Texas, Judge Poe.

Mr. POE. I thank the Chairman.

Thank you all for being here.

Ms. Aron, if I understand your testimony, the bottom line is they need more judges on the D.C. Circuit. Is that right?

Ms. ARON. My testimony is that the President has an obligation to fill existing vacancies, and certainly it is in the interest of the public that our courts be fully staffed.

Mr. POE. So is that a yes?

Ms. ARON. Did you say you were in Texas? We have eight vacancies now on the district courts in Texas.

Mr. POE. Just answer my question. Do you believe that the issue is they need more judges on the D.C. Circuit?

Ms. ARON. Yes.

Mr. POE. That is either a yes or it is a no.

Ms. ARON. Yes, I think that court ought to be fully staffed.

Mr. POE. All right. Don't you think a fairer thing to do, to any Administration, be it Republican or Democrat or whatever, that if they need more judges on a circuit court, that the law take effect at the next term of whoever president it is, to set aside any political philosophy? If it is really the need for judges, not need for progressive judges, conservative judges, if it is the need for judges, would not the fairer thing to do to be that the law would take effect for new judges at the next term of whoever is president? Yes or no?

Ms. ARON. But that is not what the Constitution says or requires in Article 2, Section 2.

Mr. POE. That is not my question.

Ms. ARON. So the answer is no.

Mr. POE. That is not my question.

Ms. ARON. The answer is no.

Mr. POE. So it is no. Don't you believe, or do you believe that judicial appointments in Federal court are political?

Ms. ARON. Some are, some aren't. Sure. I mean, let's look at—I won't go there.

Mr. POE. But you have your choice, you have your choice.

Ms. ARON. Of course some are, some aren't. But that is not the point here. The point——

Mr. POE. Well, it is the point here. You want a political appointment to serve a certain philosophy of the current president. That has been the history of other presidents as well.

Ms. ARON. I would——

Mr. POE. Excuse me.

Ms. ARON. I am sorry. Excuse me.

Mr. POE. It would be fairer that if you need more judges on a particular court, that the next term would allow that, not the current term of the sitting president, to avoid the appearance of political partisanship. That is my point.

Ms. ARON. So my response would be I think you would be surprised.

Mr. POE. I would be surprised.

Ms. ARON. If you looked at the judges that have been appointed by President Obama, 86 percent of those judges come from corporate backgrounds, come up from state courts, or come from U.S. Attorney offices. In fact, the vast majority of his appointments have been exemplary, have been individuals that enjoy respect from both sides of the political aisle.

Mr. POE. But that is not the issue we are talking about. We are talking about more judges on the D.C. Court. We are not talking about political appointments by the President of the United States in general. We are talking about the D.C. Court and stacking a particular court to meet a certain philosophy. That is really the issue that we are talking about today.

Federal judges, in my opinion, are political appointments, political appointments. In other states, or in states, like Texas, we have political elections to determine who judges are. It works for us. We are accountable, of course, to the public. We are elected, but it is still political. Political appointments, to get appointed through the political process to be a Federal judge, it is political. I have talked to a lot of Federal judges. It is very political. That is just the system that we operate under.

As far as needing more judges, I have no sympathy for the workload of the D.C. Circuit Court. I was a trial judge. My opinion is nobody should serve on an appellate bench unless they have been a trial judge, or at least a trial lawyer. That is a different issue.

But I was a trial judge, and we tried a lot of cases. Appellate courts seem to be the same in my opinion. They want more help, but do they really need it? Maybe not. They have the luxury of hearing a case and then spending time—weeks, months—to make the decision. Trial court judges don't have that luxury. We hear a case, sometimes capital murder cases that I heard, you have to rule right then. You have to make a decision, and then those cases are reviewed.

So I don't buy the argument that we need more Federal judges on the D.C. Circuit no matter who the president is.

With that, I yield back, Mr. Chairman.

Mr. GOWDY. I thank Judge Poe.

The Chair would now recognize the gentleman from Georgia, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Well, let's just finish up here with the bang that we started with. I am glad that you are here. I am glad the witnesses are here. It is really interesting to see because in just a moment we are going to get to what I call in North Georgia, and maybe around the world, we are going to call a duck a duck. Okay? We have been dancing it the whole time. So we are going to talk about this.

What is amazing right now for me is that there seems to be a theme this week, and I am going to tie it together. There seems to be a theme that has developed today and this week really with an Administration and a president who seems to not know what he does and what he doesn't know. I mean, we don't seem to have anyone from the Administration here to shed light on the approach to the courts, and that is probably okay because just like they don't know if they were spying on our allies or building a website that

worked, or probably wouldn't know if they were stacking the courts or not, or at least put out a press release to say, you know, we are not sure about that, I didn't know about it.

You know, it is a long way fall for a Democrat president who is highly respected who said the buck stops here, to now knowing, well, I don't know anything, I didn't know about that. So let's not worry about what we don't know, because that seems to be the theme from the Administration. Let's do what we do know.

We know that there are currently eight judges on the D.C. Circuit evenly split between Republicans and Democrats, and that is a problem. We know that there are three vacancies. We know that the D.C. Circuit Court averaged 41 fewer signed decisions compared to the national average. We know that the D.C. Circuit caseload is the lowest in the nation, less than half the national average. We know that the President and Members of the Senate and, frankly, you, Ms. Aron, have a vested interest, or at least an interest in ensuring that the court has a central role in litigation affecting national U.S. policy and laws, is filled with persons ascribing to his political views.

The reason I know that today is because I sat here and listened. I have listened to you, and also read from your article in which you attributed to and said yes, that you agree that you stand by your quote that balance must be restored on that court, the empty seats must be filled.

You have stated today that you don't like some of the decisions, and it was in a question-and-answer session where you said we have got to bring back balance because of the decisions that have overturned this Administration that come from a Republican court-packing scheme. And this was your own words from today.

In looking at this right here, you also made an interesting question. I want to deal with two things. It is not necessarily the political philosophy which I believe we have, and let's call the duck a duck. There is a political philosophy here that is being played out. But we also have the allocation of resources.

Ms. Aron, you have been eloquent in your position, and I respect that—we just have a difference of view here—in saying that it is the constitutional responsibility of the President to fill these vacancies. Well, there are eight emergency slots, and five have not been filled. So would you be on record right now in saying that the President is negligent in his responsibilities?

Ms. ARON. No, not at all.

Mr. COLLINS. Why not? You said he has a responsibility, that he has an overwhelming responsibility. You have said it on multiple occasions. So if he has a responsibility to the Constitution, and he has not even named nominees to eight very emergency slots, but yet he has named three to a political slot, wouldn't that be negligence, or asleep at the wheel?

Ms. ARON. First of all, I don't think you can distinguish political slots from other judicial slots. But I would say——

Mr. COLLINS. Well, stop right there. I apologize. I apologize, because you just said something very interesting, distinguishing political slots from non-political slots. In the conversation with the gentleman from Texas, you just basically said, well, some are and some are not.

Let's describe that. Are judges political appointments or not?

Ms. ARON. They are, but let's take your state of Georgia, for instance.

Mr. COLLINS. Okay.

Ms. ARON. You have had a number of vacancies in the state for years, and——

Mr. COLLINS. Then let's focus on Georgia and not the D.C. Circuit where you just don't like the opinions.

Ms. ARON. We should be focusing on all of them, but the topic for today's hearing is the D.C. Circuit.

Mr. COLLINS. So I go back to that, reallocation of assets. If you don't like the result, you want to get your political opinion here. That is the part that—I guess we danced around it long enough. I am bringing it out. You may or may not like it, and that is fine. But it is a political issue. You stated it on several occasions. But this is not about filling a caseload that needs filling.

I can agree with you in Georgia. I can agree with you in other places. My friend from North Carolina points out the most efficient court, and they are doing it with a unique perspective. But let's at least get to the point here where I believe that with the other things going on in our country, with the other things with our court system—and I am an attorney as well, and access to justice is an issue—then let's at least be honest with it.

Instead of saying, well, it may or may not be, the President appointed these folks because he didn't like what was coming out. It doesn't need to be pushed forward at this point. This is not the court to deal with. Let's deal with the five he has not appointed, because I do believe it is either asleep at the wheel or negligent. Which is it?

Ms. ARON. Well, it is neither, sir.

Mr. COLLINS. How can it not be?

Ms. ARON. It is neither. I think you have to look at the critical importance the D.C. Circuit holds in our judiciary. It is the crown jewel of the system. It hears the most complex cases. It has judges and has always had judges who have superior analytical skills. It is the court that provides the farm team for the Supreme Court. Four justices on the Supreme Court came from the D.C. Circuit.

And I would say to you, talking about politics, that the reason that Senator Grassley and some of his colleagues do not want to fill those seats is solely not due to caseload, because even John Roberts and Timothy Tymkovich disagree with him, and those aren't guys you want on the other side. You want them on your side. They don't want them on the D.C. Circuit because they understand the critical importance the D.C. Circuit has on all of our lives.

Mr. COLLINS. And you just made my case. The President wants the crown jewel.

Mr. GOWDY. The gentleman's time has expired.

Ms. ARON. No, he wants to fill vacancies, as every other president has.

Mr. GOWDY. The gentleman's time has expired.

The Chair would now recognize himself as the last questioner.

I was heartened to hear my friend from Georgia, not Mr. Collins but Mr. Johnson, long for the old days where politics and agenda

didn't involve themselves with D.C. Court of Appeals appointments. It made me wish that Mr. Johnson had been around when Miguel Estrada was nominated for the D.C. Court of Appeals, because I think the analysis was a little different then, and it certainly is a little different in South Carolina.

I know that Bill Nettles is not a Federal judge. He is the United States Attorney, so that would be a political appointment, with the word "political" modifying the appointer and not the appointee. Bill Nettles is an Obama appointee, and he is politically to the left of Chairman Mao. He has done a phenomenal job in South Carolina. I would not hesitate to appear before a Senate panel and recommend that he be re-upped for another 4 years.

Bill Traxler is the chief judge of the Fourth Circuit Court of Appeals. Do you know what president put him on the Federal bench?

Ms. ARON. President Bush.

Mr. GOWDY. Do you know who elevated him to the Fourth Circuit?

Ms. ARON. President Clinton.

Mr. GOWDY. How about Henry Floyd? Who put him on the Federal bench? Another excellent, fair trial judge that I tried many cases in front of. He was put on the district court by President Bush and was elevated to the Fourth Circuit Court of Appeals by President Obama because I spoke at his investiture.

Ms. ARON. I know. Democratic presidents often do that.

Mr. GOWDY. So I am wondering why politics has to infect and invade every single judicial conversation that we have.

Ms. Aron, I have to ask you because you said it, you said that the majority on the D.C. Court of Appeals is thwarting the President's agenda. Who? Which ones? Name them. Who? When you said that, what judges, by name, were you referring to?

Ms. ARON. I would like to talk about perhaps——

Mr. GOWDY. That is great, and when you are a Member of Congress, you can ask the questions. But for now, I get to ask the questions. I want to know who specifically you were making reference to when you said the majority is trying to thwart the President's agenda. Which judges on the D.C. Court of Appeals do you think are motivated by thwarting this president's political agenda?

Ms. ARON. I am not sure it is necessary to get into this topic, but if you want to——

Mr. GOWDY. It is necessary to me.

Ms. ARON [continuing]. Then I will be happy to tell you.

Mr. GOWDY. It is necessary to me, Ms. Aron, because you said three or four judges. You say we need more judges because the ones that are there now are insufficiently advancing the President's agenda. I want to know which ones.

Ms. ARON. Okay.

Mr. GOWDY. Who?

Ms. ARON. I will give you two examples.

Mr. GOWDY. Give me names.

Ms. ARON. Okay, I am happy to do that.

Mr. GOWDY. Give them.

Ms. ARON. Brett Kavanaugh.

Mr. GOWDY. Okay.

Ms. ARON. Why was Brett Kavanaugh selected for the D.C. Circuit? One, he authored the Starr Report. Two, he was a Whitewater prosecutor.

Mr. GOWDY. Does that mean he is not qualified?

Ms. ARON. No.

Mr. GOWDY. Does that mean he can't do a good job?

Ms. ARON. No.

Mr. GOWDY. John Roberts was the deciding vote in *Sebelius v. NFIB.*

Ms. ARON. No.

Mr. GOWDY. I bet that surprised you.

Ms. ARON. But I would say that Brett Kavanaugh was selected—look, qualified lawyers in Washington, D.C. are a dime a dozen in our biggest law firms. We know. Let's talk—let's stop the gamesmanship. Brett Kavanaugh was selected because President George W. Bush knew, if confirmed, he would pretty much carry out President Bush's agenda, and he has.

Let's talk about——

Mr. GOWDY. Let me ask you this, Ms. Aron. No, no, no, no, no. I am not going to let you do that. Who appointed Brennan to the Supreme Court?

Ms. ARON. I think Eisenhower.

Mr. GOWDY. Do you think he was surprised at the way that turned out? Who appointed Souter to the Supreme Court?

Ms. ARON. I remember that, George Bush, Sr.

Mr. GOWDY. Do you think he was surprised at the way that turned out?

Ms. ARON. He probably was.

Mr. GOWDY. Who put John Paul Stevens on the U.S. Supreme Court?

Ms. ARON. I think that was Richard Nixon.

Mr. GOWDY. Do you think he was surprised at the way that turned out?

Ms. ARON. Listen——

Mr. GOWDY. So you can't go based on who the president is, what their judicial philosophy is going to be. That is why we give them lifetime tenure.

Ms. Severino, let me ask you this. It has been a long time since I read the advance sheets. How many different courts of appeals have dealt with the recess appointment issue?

Ms. SEVERINO. The major case was the D.C. Circuit case, the NLRB case.

Mr. GOWDY. Right. But there have been two other courts of appeals, including the Fourth Circuit, that have also gone into the issue of whether or not we are going to take Harry Reid's definition of recess appointments when there is a Republican president, or whether we are going to take Harry Reid's definition of recess appointments when there is a Democrat president. All three circuits ruled the exact same way.

Ms. SEVERINO. Right, and that points to the fact that ideally judges, regardless of the nominating party, the nominating president, ought to be neutral. I think just going to the example of Brett Kavanaugh, one example is where he was the lone judge to say that he was upholding Obamacare in the recent Commerce Clause

challenges, and I think he probably got some flak from people in his party for that, but I think it was a principled decision if he did it based not on his policy interests but on his judicial judgment.

Mr. GOWDY. And he wound up being wrong on the Commerce Clause, but he should have done it under the tax and spend clause.

Ms. SEVERINO. At least he did it for the right reasons, I think, his judgment rather than his policy preferences.

Mr. GOWDY. I had lots and lots of judges rule differently from how I wanted them to rule. I never once questioned the political motivations of a judge that I appeared in front of. That is why you give them lifetime tenure.

They have sounded the bell, Mr. U.S. Attorney, for us to go vote. I do want to thank all three of our witnesses for your loaning us your expertise and your collegiality with one another and with the Members of this Committee.

I am informed that the record will remain open for 5 legislative days.

And with that, thank you again, and we are adjourned.

[Whereupon, at 4:31 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Bob Goodlatte, a Representative in Congress from the State of Virginia, and Chairman, Committee on the Judiciary

The Committee will come to order. I'll recognize myself and then the Ranking Member for opening statements.

On June 4, in a highly unusual move, the President nominated three individuals to a single circuit court—the United States Court of Appeals for the District of Columbia.

These three nominations, together with the recent Senate confirmation of a fourth selected by the President, are intended to pack the D.C. Circuit to its absolute capacity of 11 authorized judgeships.

Given that:

1) each judgeship is estimated by the Congressional Budget Office (CBO) to cost taxpayers $1 million each and every year;

2) there are eight vacancies designated as "emergencies" on our nation's circuit courts and the President has not submitted a nomination for five of these positions;

3) the Senate Judiciary Committee has not conducted a hearing on any of the three Circuit "emergency" vacancies the President did submit a nominee for;

4) the D.C. Circuit has never in its history had a single emergency vacancy;

5) the court's workload has steadily and precipitously declined over many years; and

6) the court has a generous complement of six active "senior" judges who together contribute substantially to the work of the court;

it is appropriate for the public and this Committee to ask whether filling these judgeships is the highest and best use of limited taxpayer dollars and to also consider alternative explanations as to why the President and his allies have decided at this moment to pursue such an aggressive and virtually unprecedented strategy with respect to these particular judicial vacancies.

When the President announced these three nominations, he justified his action by noting that these vacancies existed on the D.C. Circuit and asserting . . . "If we want to ensure a **fair and functioning** judiciary, our courts cannot be short-staffed."

So our first inquiry is to ask what is the evidence the D.C. Circuit is "short-staffed" and further, that the court is not "fair and functioning" and therefore needs to be dramatically enlarged.

At the outset, I want to note I consider it an affront to the judges of the D.C. Circuit to imply the court has operated in an "unfair" manner. While it is understandable that litigants, including the Administration, who fail to prove their case, will be disappointed in particular outcomes, there is no cause to suggest, by implication or otherwise, that the court has conducted itself in anything other than an honorable fashion.

Indeed, as we will soon hear, the D.C. Circuit has a well-earned reputation as a "national court" that is "the second most important . . . in the country" in terms of its prestige and impact upon a wide array of significant public interests.

We'll soon hear from our distinguished panel of witnesses but before recognizing them, I want to offer several observations.

The starting point for answering our initial question is to look at data from the Administrative Office of the U.S. Courts (AO).

According to the AO's most current publicly available data (through June 30, 2013), the D.C. Circuit's "caseload profile" shows it to be **the lowest in four out of five measured categories** of appeals in "actions per panel" among the 12 regional circuits in the country.

In terms of absolute numbers, the court has **the lowest number of "total appeals" annually** among all Circuits with only 1,193 appeals filed through September 30, 2012. That number is actually **down** more than 13% from 2005 when it was 1,379.

Measured by the **number of cases "per active judge"**, the D.C. Circuit dropped from 99 cases on average in the 2003–2004 term to only 81 in the most recent year.

Rather than focus on "pending" cases, a statistic that includes decisions routinely ratified by Circuit Court judges after initial review and recommendations by clerks (including 34(j) cases), a better proxy for the workload of an individual judge is the number of **"signed written decisions per active judge."**

Through June 30, 2013, the national average was 58. As of September 30, 2012, the average for the judges on the D.C. Circuit is **17. This is less than one-third the national average**. If anyone suggests this is an aberration then consider the greatest number for the court in the last six years was only 21.

In 1985, the court adopted a case management plan that required judges to sit eight times a year for four days and to participate in oral argument in 112 cases annually. The sittings have been steadily reduced to three-day sessions and the number of oral arguments has shrunk dramatically—to only 72.

Our witnesses will offer further detail but it is clear that by any reasonably objective criteria, the D.C. Circuit has the lowest caseload of any of the 12 regional circuits. And we haven't even begun to consider the contributions of the six active senior judges who the Chief Judge, Merrick Garland who was nominated by President Clinton, identified as the equivalent of 3.25 full time active judges. So, in effect, the court already operates with 11.25 judges.

Nor have we begun to consider that we have finite resources as a nation and that there are other Circuits with a demonstrably greater need for additional judges.

So if there isn't actually a problem with the court being "short-staffed" and it isn't unfair or not doing its work, what is driving the President and his allies to go to such lengths? The evidence suggests they object to not batting a thousand in litigation and think the court is, in fact, functioning too well.

But before looking at that, let's consider what standard the current leaders of the Senate Judiciary Committee considered appropriate for the D.C. Circuit just a few short years ago. That was when President Bush nominated Peter Keisler to the court. The "Keisler standard" was publicly proposed and enthusiastically endorsed by eight Democratic Senators in a July 27, 2006 letter to the then-Chairman of the Judiciary Committee, the late Senator Specter.

At the outset, the letter states, "Mr. Keisler **should under no circumstances be considered**—much less confirmed—by [the Senate Judiciary] Committee before we **first address the very need** for that judgeship . . . **and deal with the genuine judicial emergencies** identified by the Judicial Conference."

The authors went on to assert that "by every relevant benchmark, the caseload for that circuit has only dropped" and insisted that "before we rush to consider Mr. Keisler's nomination, we should look closely . . . at whether there is even a need for this seat to be filled and at what expense to the taxpayer."

What criteria did they propose to measure caseload? Their letter nowhere mentions "pending" cases, which are suspect because they generally don't involve much "judge-time". Instead, they said the standard is: 1) "written decisions per active judge"; 2) number of appeals resolved on the merits per active judge"; and 3) "total number of appeals filed." Since 2005, these numbers are down in two out of three categories.

The letter concluded:

> "we believe that Mr. Keisler should not jump ahead of those who have been nominated for vacant seats identified as judicial emergencies by the non-partisan Judicial Conference. . . . We should turn to [judicial emergency] vacancies first; emergency vacancies should clearly take priority over a possibly superfluous one.
>
> Given the singular importance of the D.C. Circuit, we should not proceed hastily and without full information. **Only after we reassess the need to fill this seat, perform reasonable due diligence on the nominee, and tend to actual judicial emergencies, should we hold a hearing on Mr. Keisler's nomination**."

In closing, the letter emphasized it reflected "the unanimous request of Democratic Senators." **So the Keisler standard is, in fact, the standard of all "Democratic Senators"**—at least when there is a Republican in the White House.

So this isn't the "Bob Goodlatte standard." And it isn't the "Republican Senator" standard. It is, by its own terms, the "Democratic Senator standard." When applied honestly and consistently, it admits of only one conclusion—we shouldn't be packing judges on to a court where they are not needed especially when there are higher judicial priorities.

So now we know where they stand. Or do we?

It appears the 2013 Senate Democrats are having an identity crisis. They are at odds not with Republicans but with earlier iterations of themselves. Consider one senior Democrat's complaints about the D.C. Circuit ruling that the President cannot make recess appointments unless the Senate is . . . actually in recess. With all due respect to our colleague, that hardly seems like a decision that should provoke fulminations. Indeed, it's a decision that not only respects the Constitution but also the historic role of the Senate as the "world's greatest deliberative body." Nevertheless, he told an audience in March that **"Our strategy will be to nominate four more people for each of those vacancies." And "we will fill up the DC Circuit one way or another."** That certainly doesn't sound like his concern has anything to do with the court's caseload.

A few months later, some groups united behind the call to pack the court, **complaining the court is "evenly split between Republican and Democratic presidents' appointees"** and disclaiming that a majority of the court's "senior judges—**who still can and do decide cases**—were appointed by Republican presidents." That doesn't sound like they're concerned about the ability of the court to function.

"[T]he president's best hope for advancing his agenda is through executive action, and that runs through the D.C. Circuit," offered one advocate. Shortly thereafter, the president responded with his three simultaneous nominations, implying as previously noted that his decision was out of concern for the D.C. Circuit judges' ability to properly complete their work.

But sadly, this isn't the first time the president and his allies have packed circuit courts of appeals with judges at a time when a court's workload is, in fact, decreasing. **Reminiscent of the D.C. Circuit, the Fourth Circuit Court of Appeals in Richmond has actually "canceled" argument dates for two successive months "because the court is current with its caseload and did not have cases needing argument on Friday in October or December."**

As recently as December 2007, there were only 10 "active" judges on the Fourth Circuit. Today that court, for the first time in its history, is at its full authorization of 15 judges. Of those 15, six (40%) were nominated by the president and confirmed by the same Democratic Senators who wrote of their earnest concern for taxpayers in July 2006.

In terms of caseload, the Fourth Circuit's total appeals filed (through June 30, 2013) are down from 5,460 in 2006 to only 5,064 today. How many judges were needed to handle the increased caseload back when there was a Republican in the White House and Republicans controlled the Senate in 2006? Only 12. **Looked at another way, there has been a 25% increase in judges on the Fourth Circuit in seven years at a time when the caseload actually declined 7%.**

But for the President and Senate Democrats, judicial authorizations are **a floor not a ceiling**. For them, this isn't about ensuring scarce taxpayer dollars are spent wisely and that courts have the resources they need where they are most urgently required. This is about advancing a political agenda and ensuring our federal courts, which were intended by our founders to decide cases and controversies based solely upon the Constitution and the rule of law, instead are made instruments of their political will.

That much was made clear when the Senate Majority Leader emphasized in August that he was determined to shift the ideological balance of the nation's second-highest court. "We're focusing very intently on the D.C. Circuit." "We need at least one more. There's three vacancies. **And that will switch the majority.** So we're working on it."

Some might say what of it? The President was re-elected. The Democrats maintain control in the Senate. To the victor go the spoils. But our system of justice is far too important to become a political pawn. As President Truman stated at the ceremony when the cornerstone of the very building that houses the D.C. Circuit was first laid:

> "To our forefathers, the courts were the distinctive symbol of the kind of government—the kind of society—which they were creating in the wilderness of this

continent. **This new Nation was to be a democracy-based on the concept of the rule of law."**

Before taking the oath of office as the 17th Chief Justice of the United States, Chief Justice John Roberts served two years as a Judge on the D.C. Circuit. In 2005, he delivered a lecture at the University of Virginia entitled, "What Makes the D.C. Circuit Different: A Historical View."

In his remarks, he concluded the D.C. Circuit is "a court with **special responsibility** to review legal challenges **to the conduct** of the national government." That conclusion is one that has been embraced and frequently asserted in recent months by close allies of the administration's court-packing scheme.

But an important part of Roberts' remarks they have either not noted or conveniently failed to point out is the portion that deals with the consequences of a court challenging the conduct of a powerful executive. They have also not highlighted the irony that their plan to pack the court is intended to ensure the court is made more pliant and deferential to their vision of expansive executive authority.

In describing what happened when the court challenged President Lincoln's decision to suspend the writ of habeas corpus in the District of Columbia and subsequent congressional action to abolish the court and to appoint four new judges more to the Presidents' liking, Judge Roberts recounted:

> This Civil War episode is significant in two respects. First, I believe it is a **unique episode** in American legal history, in which **reaction to a particular decision resulted in the abolition of the court and the termination of the judgeships**. Second, it shows what has been a characteristic of the District of Columbia Circuit from the beginning—**that to the extent the court asserts unique authority in the area of reviewing decisions of the national government, it is also uniquely vulnerable**.

Today, more than at any other time in the past century and a half, I believe the evidence shows the D.C. Circuit is "uniquely vulnerable" to the political branches of government. Specifically, it is being targeted by and is susceptible to the unrestrained ambitions of the party currently in charge of the White House and the Senate.

Contrary to the implication, its vulnerability is not based upon any evidence the court isn't "fair and functioning" but it derives from a perspective that the court has performed its "special responsibility to review legal challenges to the conduct of the national government" **and the conduct of this president's administration all too effectively**.

The Senate Majority Leader offered recently that the D.C. Circuit, "is, some say, more important than the Supreme Court."

The public would be wise to take note of the determination of the Senate Majority Leader and the Democratic members of the Senate to change the rules and the rulings of the court. The ongoing campaign to pressure and reshape the D.C. Circuit is designed to subordinate the rule of law and to elevate political and ideological considerations in rendering constitutional and legal judgments. As such, it is an effort all Americans should be concerned about.

If Republican Senators have any doubt what they ought to do in this situation then they should recall and faithfully apply the standard so forcefully and clearly articulated by the "**unanimous request of Democratic Senators**" in 2006.

They should also take note of the characterization offered by the current Chairman of the Senate Judiciary Committee in 2002:

"When a President is intent on **packing the courts and stacking the deck on outcomes**, consideration of balance and how ideological and activist nominees will affect a court are valid considerations."

A President intent on packing the court and stacking the deck on outcomes is exactly what we have here. But the campaign to politicize our courts and to specifically target the "second-highest court in the land" risks not merely wasting scarce public funds but squandering something much more precious—public confidence in the independence of the judiciary.

This campaign has nothing to do with "fair and functioning" courts. It has everything to do with ideology and power politics.

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October 31, 2013

Honorable Bob Goodlatte, Chair
Honorable John Conyers, Ranking Member
House Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Representatives Goodlatte and Conyers:

We are writing in regard to testimony by Ambassador C. Boyden Gray at the Judiciary Committee's October 29 hearing on the three current vacancies on the U.S. Court of Appeals for the District of Columbia. Citing an article we co-authored, Mr. Gray attributed to the two of us an argument central to his testimony, namely, that President Obama submitted nominations to fill these three vacancies in order to advance his administration's policy agenda – specifically, to assure judicial validation of pertinent EPA Clean Air Act regulations. "As proponents of the nominations have *pointed out*," Mr. Gray stated, citing our article,[1] "it is *no accident* that Obama's judicial nomination barrage followed his State of the Union promise that 'If Congress won't act' on climate change, "I will.'" (Emphasis added.)

Mr. Gray here mischaracterized our article. Accordingly, we request that this letter be included in the hearing record, to set it straight.

Nowhere does our article state or imply that President Obama's submission of nominees for the D.C. Circuit was motivated by considerations different from or less appropriate than those which have led him and every other president in our history to fulfill their constitutional duty of nominating qualified individuals to the federal courts. In fact, the article was completed well before the three pending nominations were made, and, indeed, before President Obama's first D.C. Circuit nominee, Sri Srinivasan, was confirmed by a 98-0 vote (a result which Mr. Gray notes with apparent approval). To be sure, our article did note the critical position that the D.C. Circuit commands with respect to environmental regulation – an unremarkable point, given that circuit's exclusive jurisdiction over EPA regulations implementing the Clean Air Act as well as other environmental laws. We also noted specific decisions that support the observations of experts like Steven Pearlstein, Pulitzer Prize-winning columnist and now a professor at George Mason University, that on the D.C. Circuit, "a new breed of activist judges are waging a determined war on federal regulatory agencies." And we certainly spotlighted the overt obstructionism, driven by express political and ideological calculation, behind serial Senate

[1] Doug Kendall & Simon Lazarus, *Broken Circuit*, THE ENVIRONMENTAL FORUM 36 (May-June 2013)

filibusters of distinguished Obama nominees, such as today's rejection of cloture for D.C. Circuit nominee Patricia Millett, one of the nation's pre-eminent Supreme Court advocates.[2]

But we certainly do not endorse Mr. Gray's ascription of inappropriate motives to President Obama's nomination of outstanding judicial candidates such as Patricia Millett. Nor will such nominees, if confirmed, be any less fair, independent, and broadly respected than they have already proven themselves in their current professional roles. Nothing in our article lends any support whatsoever to Mr. Gray's regrettable insinuation to the contrary.

We appreciate your including this letter in the Committee's hearing record.

Sincerely,

Doug Kendall

Doug Kendall, President, Constitutional Accountability Center

Simon Lazarus, Senior Counsel, Constitutional Accountability Center

[2] As acknowledged by Senator Ted Cruz to the nominee during her confirmation hearing, "irrespective of your very fine professional qualifications . . . [y]ou find yourself in the midst of a broader battle. And a battle on issues sadly that have consumed the D.C. Circuit for decades . . . . There is a lot of political games when it comes to judicial nominations, both sides have decried the political games . . . . [U]nfortunately the D.C. Circuit has been a battleground on both sides, for the politicization of judicial nominations."

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November 5, 2013

Honorable Bob Goodlatte, Chair
Honorable John Conyers, Ranking Member
House Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Re: Hearing: "Are More Judges Always the Answer?"

In my prepared statement, I wrote, "As proponents of the nominations have pointed out, it is no accident that Obama's judicial nomination barrage followed his State of the Union promise that 'if Congress won't act' on climate change, 'I will.' "[1] I cited for this proposition an article by Doug Kendall and Simon Lazarus of the Constitutional Accountability Center that reproduces the quoted portion of President Obama's address.[2]

Mr. Kendall and Mr. Lazarus then wrote to this Committee to complain that I had unfairly attributed to them the argument that "President Obama submitted nominations . . . to assure judicial validation of pertinent EPA Clean Air Act regulations."[3]

But a quick look at their article proves the point they now dispute. They do not deny (1) that they are proponents of the President's nominations, (2) that they believe confirming new D.C. Circuit judges would help to entrench the President's regulatory achievements, or even (3) that this was the motive for

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[1] *Are More Judges Always the Answer?, Hearing Before the H. Comm. On the Judiciary* (Oct. 29, 2013) (statement of Amb. C. Boyden Gray), at 5.

[2] Doug Kendall & Simon Lazarus, *Broken Circuit*, THE ENVTL. FORUM 36 (May/June 2013), *available at* http://theusconstitution.org/sites/default/files/briefs/The%20Environmental%20Forum%20- %20Broken%20Circuit.pdf.

[3] Letter from Doug Kendall & Simon Lazarus to the House Committee on the Judiciary 1 (Oct. 31, 2013).

President Obama's recent nomination blitz.[4] Apparently their argument is that their article did not expressly say so.

But what other implication can be drawn from their observations

- that in the face of "gridlock on Capital Hill" over proposed climate legislation, the President chided Congress for its inaction and announced that "if Congress won't act soon to protect future generations, I will,"[5]

- that "the Obama administration's effort to use the [Clean Air Act] to address global warming runs th[r]ough the D.C. Circuit,"[6] and

- that the likely "trump card . . . in the outcome of . . . fights" over new and forthcoming environmental regulations "is the makeup of the D.C. Circuit"?[7]

If this narrative does not "point out" the connection between President Obama's promised D.C. Circuit nominations and his Clean Air Act climate change agenda, it is hard to imagine what would. It leaves no doubt that President Obama's recent nomination blitz was intended to cement his Administration's regulatory actions. Indeed, that is exactly what Mr. Kendall and Mr. Lazarus urged.

The irony in all of this is that the D.C. Circuit has been nothing but deferential to the Obama administration and its regulations. Indeed, according to statistics maintained by the Administrative Office of U.S. Courts, the D.C. Circuit has reversed administrative agencies *less* during the Obama years (16.7%) than it did during the Bush years (18.8%). And, as even Mr. Kendall and Mr. Lazarus are forced to admit, President Obama's signature climate change regulations were upheld by a unanimous panel of the D.C. Circuit, including judges nominated by presidents of both parties.

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[4] Mr. Kendall and Mr. Lazarus reject any "ascription of inappropriate motives to President Obama's nomination[s]," Letter, *supra* note 3, at 2, but they clearly do not believe that stacking a court to preserve an Administration's regulatory agenda is an improper motive. Indeed, the whole point of their article is to "rally" the troops around the President's D.C. Circuit nominations to cement "the future of environmental law."

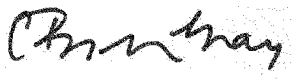
[5] Kendall & Lazarus, *supra* note 2, at 36.

[6] *Id.* at 36.

[7] *Id.* at 37.

These inconvenient details seem to have escaped Nan Aron, my fellow panelist before this Committee, who looked at the D.C. Circuit's recent administrative law decisions selectively, ignoring the vast majority in which the court ruled for the Administration and complaining about a few specific cases in which she disliked the result. Ms. Aron reserved her strongest censure for an opinion by Judge Brett Kavanaugh vacating the Cross-State Air Pollution Rule. Nan Aron cited this as an example of D.C. Circuit bias against the current Administration and said that the court's decision was costing thousands of lives every year. This is ludicrous. The court invalidated the CSAPR because it could have required some states to make up for other states' pollution and because it imposed Federal Improvement Plans without first giving states a chance to come up with their own as the Clean Air Act requires. But the court left in place the rigorous cap and trade system of the predecessor Clean Air Interstate Rule, which the EPA continues to administer "pending the promulgation of a valid replacement." Nothing prevents the agency from rewriting the rule to follow the law.

Sincerely,



BOYDEN GRAY & ASSOCIATES PLLC

By: C. Boyden Gray
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JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE JOHN D. BATES
Secretary

November 15, 2013

Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte:

On behalf of the Judicial Conference of the United States, I write to request that this letter be made part of the record of the hearing held on October 29, 2013, entitled "Are More Judges Always the Answer?"

The hearing's broad title suggests that the focus would have been on the size of the federal bench, and whether, in light of the steadily-increasing workload of the Federal Judiciary, more judgeships should be added. Indeed, since the last comprehensive judgeship bill was passed in 1990, Article III district courts have seen a 39 percent growth in caseload while circuit court filings have risen by 34 percent. Over this same time, however, the federal bench has only seen a four percent increase in district court judgeships while the number of circuit court judgeships has remained unchanged.

To determine the extent of the judiciary's judgeship needs, the Judicial Conference conducts an extensive biennial survey of the courts. This survey includes input from individual courts and circuit judicial councils, and the Conference's Committee on Judicial Resources, and involves an analysis of caseload data using a variety of factors. The results of the most recent survey were approved by the Conference this past March and transmitted to Congress on April 5, 2013.

As it turned out, however, the hearing focused on whether certain vacancies on specific courts should remain unfilled. Regardless of how those particular vacancies are viewed, the Judicial Conference has determined that additional judgeships are needed for certain courts across the country. The recommendations are made on the premise that there are no vacancies, and workload calculations are based on that assumption. Where vacancies exist, the actual per-judge

workload handled by the remaining judges on that court is even higher than the calculated filings per authorized judgeship or panel would indicate. Occasionally, the Conference recommends that a vacancy not be filled if a court's caseload does not support it.

The Conference understands that action on the full set of recommendations for additional judgeships may not be feasible in this fiscal climate. However, the Conference respectfully asks Congress to act swiftly to assist those courts with the greatest need. Critical levels have been reached in five district courts that are now struggling with extraordinarily high and sustained caseloads: the District of Delaware, the Eastern District of California, the Eastern District of Texas, the Western District of Texas, and the District of Arizona. Each of these districts currently has a caseload in excess of 700 weighted filings per authorized judgeship (averaged over a three-year period), and in the District of Delaware and the Eastern District of California this figure is over 1,000.

Moreover, the Conference also urges Congress to convert the urgently needed temporary judgeships to permanent status in the Eastern District of Texas, the District of Arizona, the Central District of California, the Southern District of Florida, the Northern District of Alabama, and the District of New Mexico. Sustained caseload levels in each of these districts have led the Conference to recommend converting these judgeships, all of which are set to expire by the end of fiscal year 2014. Without re-authorization, these on-board resources will be lost, further damaging the Federal Judiciary by diminishing already scarce judicial resources in these districts.

The Conference hopes that Congress will take steps in the near future to provide these critical judgeship resources that several courts need to carry out their constitutional responsibilities. If we may be of further assistance to you in this or any other matter, please do not hesitate to contact the Office of Legislative Affairs, Administrative Office of the U.S. Courts, at (202) 502-1700.

Sincerely,

John D. Bates
Secretary

cc: Honorable Howard Coble

Identical letter sent to: Honorable John Conyers, Jr.

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